91-1945 (1)
No.____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

TRIANGLE INDUSTRIES, INC.,
a/k/a ANC HOLDINGS, INC.;
TRIANGLE PWC, INC.,
Petitioners,

v.

LIBERTY MUTUAL INSURANCE CO.,
NEW JERSEY PROPERTY/LIABILITY INSURANCE
GUARANTY ASSOCIATION, on behalf of
IDEAL MUTUAL INSURANCE COMPANY, in liquidation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fourth Circuit erred in deciding an issue of New Jersey law unaddressed by, but currently pending before, the Supreme Court of New Jersey in *Morton International, Inc. v. General Accident Insurance Co. of America* No. 34,341, (N.J. Sup.Ct. *certif. granted*, March 2, 1992), involving the interpretation of the pollution exclusion clause of a Comprehensive General Liability ("CGL") policy, in a manner which is diametrically opposed to the decision of the United States Court of Appeals for the First Circuit, *CPC International, Inc. v. Northbrook Excess and Surplus Insurance Co.*, Nos. 91-1580 and 91-1734, 1992 U.S. App. LEXIS 5342 (1st Cir. March 24, 1992), thereby creating an inter-circuit conflict which requires this Court to accept jurisdiction and then stay all further proceedings pending the decision of the New Jersey Supreme Court in *Morton*?

2. Whether the United States Court of Appeals for the Fourth Circuit incorrectly predicted that the New Jersey Supreme Court would hold that the sudden and accidental exception to the pollution exclusion clause in a CGL policy applies to the "discharge" of contaminants, as opposed to the "pollution damage," as interpreted by New Jersey's trial and intermediate appellate courts in accordance with the standards announced by this Court in the cases of *Salve Regina College v. Russell*, __ U.S. __, 111 S.Ct. 1217, 1222, 113 L.E.2d 190 (1991) and *C.I.R. v. Bosch's Estate*, 387 U.S. 456, 87 S.Ct. 1776, 18 L.E.2d 886 (1967)?

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No.____

IN THE

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TRIANGLE INDUSTRIES, INC.,
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LIBERTY MUTUAL INSURANCE CO.,
NEW JERSEY PROPERTY/LIABILITY INSURANCE
GUARANTY ASSOCIATION, on behalf of
IDEAL MUTUAL INSURANCE COMPANY, in liquidation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Triangle Industries, Inc. and Triangle PWC, Inc. (collectively, "Triangle" or "Petitioners"), respectfully request that a Writ of *Certiorari* be issued to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-captioned proceeding on March 2, 1992.

OPINIONS BELOW

1. The Opinion of the United States Court of Appeals for the Fourth Circuit, *Liberty Mutual Insurance Company v. Triangle Industries, Inc.*, 957 F.2d 1153 (4th Cir. 1992), is reprinted in the Appendix hereto at A-1.

2. The Opinion of the United States District Court for the Northern District of West Virginia, *Liberty Mutual Insurance Company v. Triangle Industries, Inc.*, 765 F.Supp. 881 (N.D.W.Va. 1991), is reprinted in the Appendix hereto at A-17.

3. The Opinion of the West Virginia Supreme Court of Appeals deciding that New Jersey substantive law

applies in this matter, *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*, 390 S.E.2d 562 (W.Va. 1990), is reprinted in the Appendix hereto at A-28.

JURISDICTION

The Judgment and Order of the United States Court of Appeals for the Fourth Circuit, filed on March 2, 1992, affirmed the Judgment of the United States District Court for the Northern District of West Virginia, which held that under New Jersey law, CGL insurance policies which contain "original" pollution exclusion clauses do not provide coverage for "unintended environmental damage which allegedly continues to arise from past regular surface disposal in a landfill of the waste products of a standard manufacturing process," *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*, 957 F.2d 1153 (4th Cir. 1992), A-3. The Mandate of the United States Court of Appeals for the Fourth Circuit took effect on March 23, 1992. Petitioners' Motion to Recall and Stay the Mandate of the United States Court of Appeals for the Fourth Circuit was filed on April 7, 1992. The Fourth Circuit's Order denying Petitioners' Motion was filed on April 24, 1992. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The outcome of this case will determine whether policy holders are entitled to insurance coverage under New Jersey law for the costs of cleaning up a superfund site located in Ohio, when the waste disposed of was declared by the federal government to be non-hazardous under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§6901, *et seq.* ("RCRA"), but which is currently regulated under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601, *et seq.* ("CERCLA") (effective December 1980), a federal law which did not become effective until after the disposal activities by Triangle had ceased.

Triangle was a company engaged in the fabrication of wire and cable line and owned a processing plant in Glen Dale, West Virginia. Triangle used a process of "pickling" the steel, which generated a waste product known as "lime-stabilized waste pickle liquor sludge" ("sludge" or "waste"). *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*, 957 F.2d 1153 (4th Cir. 1992), A-16, A-3; *See also* 46 *Fed. Reg.* 17,202.

Between November, 1977 and October, 1980, the sludge was shipped to the Buckeye Landfill located outside St. Clairsville, Belmont County, Ohio, for disposal. A-3. Triangle engaged the services of independent contractors to transport the sludge to the landfill. A-3. Triangle itself did not dispose of the waste at the site.

The sludge was delisted from regulation under RCRA as being non-hazardous. *See* 46 *Fed. Reg.* 17,202 (temporary exclusion from regulation) and 49 *Fed. Reg.* 23,287 (adopting final rule). An analysis of Triangle's waste generated at its Glen Dale, West Virginia, facility found that:

> The constituents of concern in the waste are chromium and lead. EP extracts from sludge samples analyzed by [Triangle] show lead and chromium consistently well below the maximum EP toxicity levels. These low leakage levels indicate that the constituents are present in essentially an *immobile* form.

See 46 *Fed. Reg.* 17,202 (emphasis and brackets added).

The analysis of the waste showed that chromium and lead were immobile and would not leak out. Triangle had petitioned the United States Environmental Protection Agency ("U.S. EPA") to delist its sludge because the "sludge is environmentally stable and non-hazardous, and specifically that the sludge does not contain hazardous levels of chromium and lead, the constituents of concern, for which spent pickle liquor waste (K 062) was listed." *Id.* Accordingly, Petitioner believed its waste was safe for disposal in landfills. The U.S. EPA agreed and removed the sludge from regulation under RCRA.

40 C.F.R. 261.3(c)(2)(II). The sludge contained trace amounts of chemicals, however, which were regulated under CERCLA, 42 U.S.C. §§9601, *et seq.*, which became effective on December 11, 1980, *after* Triangle's disposal of the sludge at the Buckeye landfill had ceased.

The eight policies of insurance under which Triangle originally sought coverage included[1]: (1) one comprehensive general liability ("CGL") policy issued by Ideal Mutual Insurance Company ("Ideal Mutual") covering the period from January 1, 1981 to January 1, 1982; (2) two CGL policies issued by Liberty Mutual Insurance Company ("Liberty Mutual") covering the period from January 1, 1982 to January 1, 1984; (3) four CGL policies issued by Zurich Insurance Company ("Zurich") covering the period from January 1, 1984 to April 1, 1987; and (4) one claims-made policy issued by Zurich covering the period from May 15, 1984 to May 15, 1985.

Ideal Mutual was placed in liquidation on February 7, 1985. In accordance with *N.J.Stat.Ann.* §17:30A-12 (West 1985), the New Jersey Property Liability Insurance Guaranty Association ("NJPLIGA") is the primary insurance guaranty association against which Triangle has made claims.

Each of the relevant CGL policies contained both the broad general covenant to pay "all sums" for which Triangle may become legally obligated to pay, and the covenant to provide Triangle with a defense to any suit brought against it. The standardized policy language reads as follows:

> The company will pay on behalf of the insured all sums which the *insured* shall become legally obligated to pay as damages because of

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1. Only the policies described in categories one (1) and two (2) are the subject of this Petition. The policies issued by Zurich did not contain the "original" pollution exclusion clauses. Accordingly, the issues raised by this Petition do not involve the contracts of insurance issued by Zurich.

> Coverage A: *bodily injury*, or
> Coverage B: *property damage*,
> to which this insurance applies, caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such *bodily injury* or *property damage*, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

A-34. (emphasis in original).

The term "occurrence" is defined under each of the CGL policies in the relevant part as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage *neither expected nor intended* from the standpoint of the insured.

A-6-7. (emphasis in original).

The pollution exclusion clauses contained in the policies issued by Ideal Mutual and Liberty Mutual provide as follows:

> This insurance does not apply . . . to . . . property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acid, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, but this *exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*

A-7. (emphasis added).

On or about October 15, 1980, the Ohio EPA conducted sampling of sludge located at the Buckeye Landfill and determined that the sludge was "toxic." A-17.

Triangle ceased its disposal activities on or about October 6, 1980. A-16.

The only evidence of record regarding Triangle's knowledge of the alleged hazardous nature of the waste indicates that Triangle thought the waste was not hazardous and, accordingly, believed that the waste would neither leach chemicals into the land, nor change from its essential earth-like composition:

> Based on the above analysis, this material may be classified as non-toxic, nonhazardous, non-liquid which could be classified as a solid, suitable for disposal in your landfill operations.

See A-42, Letter dated May 14, 1979, from Triangle to Cravat Coal Company; and 46 *Fed. Reg.* 17,202 (RCRA delisting petition showing Triangle considered the waste environmentally stable).

On or about December 7, 1984, Triangle was notified by the U.S. EPA that it was being designated a "potentially responsible party" ("PRP") pursuant to CERCLA in connection with the alleged environmental contamination of the Buckeye Landfill. A-17. On or about October 3, 1985, Triangle, along with other PRPs, executed an administrative consent order as required by the U.S. EPA and Ohio EPA for the cleanup of the landfill. A-17 and 33.

On or about September 8, 1983, the Buckeye Landfill was listed on the National Priorities List ("NPL") pursuant to Section 105 (8)(b) of CERCLA by publication in the Federal Register, at 48 *Fed.Reg.* 40658-40682 (1983). A-17. On or about March 7, 1985, counsel for Triangle placed all of Triangle's insurance carriers on notice of the claims asserted by the U.S. EPA arising out of the enforcement actions at the Buckeye landfill. A-4 and 18.

On April 13, 1988, Liberty Mutual filed the underlying action in the United States District Court for the Northern District of West Virginia seeking a declaratory judgment that it owed no duty to defend or indemnify

Triangle[2]. Triangle filed an answer, affirmative defenses and counterclaims on June 10, 1988. Liberty Mutual filed a reply to the counterclaim on July 27, 1988. *See* A-5.

On June 20, 1988, Triangle filed a third-party complaint against Employers Insurance of Wausau, a Mutual Company ("Wausau"), The New Jersey Property-Liability Insurance Guaranty Insurance Association, on behalf of Ideal Mutual Insurance Company, in liquidation ("NJPLIGA"), and Zurich Insurance Company ("Zurich"). Answers to the Third Party Complaint were filed by these parties on August 1, July 26, and August 4, 1988, respectively. From January 17, 1989 to May 19, 1989, the parties filed and exhaustively briefed cross-motions for summary judgment on the Complaint and the Third Party Complaint.

By Order dated July 5, 1989, the United States District Court for the Northern District of West Virginia certified the following two questions of law to the West Virginia Supreme Court of Appeals pursuant to W.Va. Code §§51-1A-1, *et seq.*: (1) Does West Virginia's substantive law apply to the interpretation of the insurance policies at issue; and (2) if so, do the insurance policies at issue give rise to a duty to defend and indemnify the insured by the respective insurers. The Supreme Court of West Virginia filed an opinion on February 21, 1990, holding that New Jersey law governed the interpretation of the insurance contracts at issue and remanded the matter to the United States District Court for the Northern District of West Virginia. *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*, 390 S.E.2d 562 (W.Va. 1990).

Thereafter, Triangle renewed its motions for summary judgment on the Complaint and the Third Party Complaint in the District Court. The insurers filed cross-motions for summary judgment. On March 12,

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2. Jurisdiction was conferred on the District Court by 28 U.S.C. §1332.

1991, the Honorable William Kidd, U.S.D.J., filed a Memorandum Opinion and Order granting summary judgment to Liberty Mutual, to Zurich and to NJPLIGA (on behalf of Ideal Mutual). *Liberty Mutual Insurance Company v. Triangle Industries, Inc.*, 765 F.Supp. 881 (N.D.W.Va. 1991), reprinted at A-15. This Order was made final by an Order dated July 5, 1991, from which Triangle appealed. A-26. The July 5, 1991, Order dismissed Wausau from the case following a settlement reached between Wausau and Triangle.

The District Court determined that Petitioners did not "intend or expect" to cause property damage, that there was an "occurrence" within the meaning of the insurance policies in question, that "property damage" had occurred during that period and that clean up costs are "damages" – all within the meaning and within the policy periods of the CGL policies. *Id.*, reprinted at A-20-21. Although the District Court decided that Triangle did not intend or expect the damage, it nevertheless denied coverage because it found that Triangle both intended and expected to have the materials transported to and deposited in the Buckeye Landfill. *Id.*, at A-22.

On July 31, 1991, Triangle filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit, which appeal was argued before the Fourth Circuit on December 3, 1991. A-2. The principal issue on Appeal was whether the "sudden and accidental" exception to the pollution exclusion clause applied to the *"damages"* caused by the release, or to the *discharge* of the pollutants. Respondents did not cross-appeal from the decision of the District Court. Jurisdiction in the United States Court of Appeals for the Fourth Circuit was conferred by 28 U.S.C. §1291.

On March 2, 1992, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the United States District Court for the Northern District for West Virginia and held that under New Jersey law, the CGL policies which contain "original" pollution exclusion clauses do not provide coverage for

"unintended environmental damage which allegedly continues to arise from past regular surface disposal in the landfill of the waste products of a standard manufacturing process." *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*, 957 F.2d 1153 (4th Cir. 1992), reprinted at A-1. Coincidentally, on March 2, 1992, the same day of the filing of the Fourth Circuit's opinion, the New Jersey Supreme Court granted Certification to decide the identical issue of New Jersey law in the case of *Morton International, Inc. v. General Accident Insurance Co. of America*, Docket No. 34,341 (N.J. Sup.Ct. *certif. granted*, March 2, 1992).

On March 23, 1992, the United States Court of Appeals for the Fourth Circuit filed its Mandate effectuating its Opinion and Order of March 2, 1992. A-39. On March 24, 1992, the United States Court of Appeals for the First Circuit decided the case of *CPC International, Inc. v. Northbrook Excess and Surplus Insurance Co.*, Nos. 91-1580 and 91-1734, 1992 U.S. App. LEXIS 5342 (1st Cir. Mar. 24, 1992), which involved an appeal from an Order of a Rhode Island District Court granting summary judgment in favor of an insurance company, based upon the application of New Jersey law to the identical pollution exclusion clause analyzed by the Fourth Circuit in this case. Contrary to the Fourth Circuit's Opinion and Order, however, the First Circuit reversed the District Court and held that the sudden and accidental exception to the pollution exclusion clause did not bar coverage for the insured.

Petitioners filed a Motion to Recall and Stay the Mandate with the Fourth Circuit on April 7, 1992, on the grounds that there existed an inter-circuit conflict between the First and the Fourth Circuit on an identical issue of New Jersey state law, which would be resolved by the New Jersey Supreme Court's decision in *Morton, supra*. The Motion was denied by Order of the United States Court of Appeals for the Fourth Circuit, without opinion, on April 24, 1992, A-40, leaving Petitioners no recourse other than to seek review in this Court, a

course of action which Respondent, Liberty Mutual, suggested Triangle should follow in its Opposition to Petitioners' Motion to Recall and Stay the Fourth Circuit's Mandate. A-57.

REASONS FOR GRANTING RELIEF

I. IN LIGHT OF THE INTER-CIRCUIT CONFLICT CREATED BY THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THIS CASE AND THE DECISION OF THE FIRST CIRCUIT IN *CPC INTERNATIONAL, INC. v. NORTHBROOK EXCESS AND SURPLUS INSURANCE CO.*, AS WELL AS THE DECISION OF THE NEW JERSEY SUPREME COURT IN *MORTON INTERNATIONAL, INC. v. GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA*, TO DECIDE THE IDENTICAL STATE LAW QUESTION ADDRESSED BY THE FOURTH AND FIRST CIRCUITS, THIS COURT SHOULD GRANT THE PETITION FOR *CERTIORARI* AND STAY THE PROCEEDINGS IN THIS MATTER PENDING THE DECISION OF NEW JERSEY'S HIGHEST COURT

A. PRIOR DECISIONS OF THIS COURT DICTATE THAT, UNDER THESE CIRCUMSTANCES, THE PETITION FOR THE WRIT OF *CERTIORARI* SHOULD BE GRANTED.

Review by this Court on writ of *certiorari* is not a matter of right, but of judicial discretion. *Sup. Ct. R.* 10.1. A petition for a writ of *certiorari* will be granted only when there are special and important reasons therefor. *Id.* The Rules of this Court set forth the factors that will be considered in deciding whether or not to grant a petition for *certiorari*, including, but not limited to, "When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." *Sup. Ct. R.* 10.1(a). The decision of this Court in the case of *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 58 S.Ct. 860 (1938), which interprets this rule, held that:

> Since jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given to this Court in order "to secure uniformity of decision," a showing of a conflict of circuits on a matter concerning which the federal courts had never denied their right to independent judgment prompted this Court to grant the writ. As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely a corollary to a permissible difference of opinion in the state courts. The rules indicate that the Court will be persuaded to grant certiorari where a Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions."

Id. at 861 (citations omitted). *Ruhlin* involved a suit by New York Life Insurance Company against John G. Ruhlin and others, to rescind the disability and double indemnity provisions of life insurance policies, requiring the court to engage in insurance contract interpretation under applicable state law. *Id.* at 860.

Although this Court declined to address the issue of state law presented in *Ruhlin*, it remanded the cause to the District Court, so that it might decide the relevant issues of state law, stating that "no decision at the present time could reconcile any 'conflict of circuits,' or do more than enunciate a tentative rule to guide particular federal courts." *Id.* at 861. Unlike *Ruhlin*, a decision by this Court in the instant case to grant the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit and stay the proceedings pending the decision of the New Jersey Supreme Court in *Morton* interpreting the "sudden and accidental" exception to the pollution exclusion clause in CGL policies would not only reconcile the conflict between the First and Fourth Circuits, it would facilitate a fair and equitable resolution of this important issue of state law for the parties to this action.

Moreover, it would be anomalous and unfair were Liberty Mutual to prevail in this case on this issue and lose in *Morton* based upon the fortitutous circumstance that the Fourth Circuit rendered its opinion in this case *before* the New Jersey Supreme Court decided the identical issue in *Morton*. Such a result would fly in the face of the governing principle that like cases should be decided based upon a uniform principle of law.

Accordingly, we respectfully request that this Court grant the Petition for a Writ of *Certiorari* and stay these proceedings, pending the New Jersey Supreme Court's decision on this issue, or, in the alternative, to recall and stay the Mandate of the United States Court of Appeals for the Fourth Circuit, pending the New Jersey Supreme Court's decision in *Morton*, so that an appropriate motion to reconsider, modify or amend the Order can be filed with the Fourth Circuit.

B. IN THIS CASE, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED THE IDENTICAL ISSUE OF NEW JERSEY LAW IN A MANNER DIAMETRICALLY OPPOSED TO THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, THEREBY CREATING AN INTER-CIRCUIT CONFLICT WHICH CAN BE RESOLVED BY GRANTING THIS PETITION FOR *CERTIORARI*.

On March 24, 1992, the United States Court of Appeals for the First Circuit applied and interpreted New Jersey law involving the identical "sudden and accidental" exception to the pollution exclusion clause in CGL policies, in the case of *CPC International, Inc. v. Northbrook Excess and Surplus Insurance Co.*, Nos. 91-1580 and 91-1734, 1992 U.S. App. LEXIS 5342 (1st Cir. March 24, 1992). As was required of the United States Court of Appeals for the Fourth Circuit in the case below, the First Circuit was forced to decide the same issue of New Jersey state law involving the interpretation of the "sudden and accidental" exception to the pollution exclusion clause, with no guidance from New

Jersey's highest court. In *CPC International*, however, the First Circuit reached a conclusion that was directly at odds with the Fourth Circuit's holding in this case. The "inter-circuit" conflict that was created by the Fourth Circuit's decision in this case and the First Circuit's decision in *CPC International* involves a critical issue of contract interpretation and insurance coverage in the environmental context which should be resolved by the New Jersey Supreme Court so that all parties similarly situated receive fair and uniform treatment. As Judge Campbell, in his concurring opinion in *CPC International*, stated:

> This case clearly demonstrates how unfortunate it is that New Jersey lacks a certification law or rule. It should be, but alas is not, possible for us to certify this important question to the State's highest Court. If we could do so, all guesswork would be eliminated. As the United States Supreme Court has noted, certification "saves time, energy, and resources and helps build a cooperative judicial federalism."

Id. (citing Lehman Bros. v. Schein, 416 U.S. 386, 391, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974)). In order to effectuate the policy behind this Court's holding in *Lehman Bros. v. Schein*, *supra*, this Court should seize the opportunity to allow the highest Court of New Jersey to decide this important issue of insurance coverage under New Jersey law and have the issue resolved as if a certification procedure had been available.

It would be unjust to deprive Petitioners of the benefit of the New Jersey Supreme Court's interpretation and application of its own law. In *Morton*, the New Jersey Supreme Court will be deciding this critical issue in the near future. Accordingly, this Court should grant Triangle's Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit, and then stay further proceedings pending the New Jersey Supreme Court's decision in *Morton*.

In *CPC International*, 1992 U.S. App. LEXIS 5342 at 16, the First Circuit held that the "sudden and

accidental" exception to the pollution exclusion clause in the CGL policy means "unexpected and unintended," and thus concluded that under New Jersey law, given facts identical to the instant case, the coverage issue should be resolved in the favor of the insured. In this case, the Fourth Circuit denied coverage on the identical facts and policy language. Respondent, Liberty Mutual, in *Liberty Mutual Insurance Co.'s Opposition to Petitioners' Motion to Recall and Stay the Mandate of the United States Court of Appeals for the Fourth Circuit* stated that:

> To the extent that there is any inconsistency between the *CPC International* decision and this Court's March 2, 1992 judgment, it is the role of the United States Supreme Court to determine which decision is correct. Pursuant to Supreme Court Rule 13, the period for Triangle to petition for certiorari has not expired. Triangle will thus not suffer injustice if this Court's mandate remains in place.

A-57. Thus, Petitioners and Respondent, Liberty Mutual, are in agreement that the resolution of this "intercircuit" conflict is within the province of this Court and, hence, the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit should be granted.

C. THE NEW JERSEY SUPREME COURT'S DECISION IN *MORTON INTERNATIONAL, INC. v. GENERAL ACCIDENT INSURANCE CO. OF AMERICA*, WILL ONCE AND FOR ALL, RESOLVE THE INTERCIRCUIT CONFLICT BETWEEN THE FOURTH AND FIRST CIRCUITS. ACCORDINGLY, THIS COURT SHOULD GRANT THE PETITION, STAY ALL FURTHER PROCEEDINGS IN THIS CASE, AND AWAIT THE NEW JERSEY SUPREME COURT'S DECISION IN *MORTON*.

On March 2, 1992, the Supreme Court of New Jersey granted Morton International's Petition for Certification, A-43, in the case of *Morton International, Inc.*

v. General Accident Insurance Co. of America, No. 34, 341, on appeal from the decision of the Appellate Division of the Superior Court of New Jersey in *Morton International, Inc. v. General Accident Insurance Co. of America*, No. A-895-89T3 (App. Div. October 2, 1991), decided October 2, 1991, which contained a number of insurance coverage issues.

The Cross-Petition for Certification of Defendants-Respondents, Insurance Company of North America, American Home Assurance Co., Liberty Mutual Insurance Company, Underwriters at Lloyd's London, and London Markets Insurance Companies, A-50, was also granted by Order of the New Jersey Supreme Court, dated March 2, 1992. A-53. The Cross-Petition, in which Respondent, Liberty Mutual, joined, specifically requested that the issue of the interpretation of the "sudden and accidental" language in the exception to the pollution exclusion clause of the CGL policies be reviewed and decided. A-50.

In fact, the Cross-Petitioners in *Morton*, including Liberty Mutual, Respondent in this case, specifically emphasized the need for the New Jersey Supreme Court to address the identical issue raised in this case, relating to the pollution exclusion clause and its sudden and accidental exception, the resolution of which would concomitantly settle the question which created the intercircuit conflict between the Fourth and First Circuits. In asking the New Jersey Supreme Court to review the pollution exclusion and affirm the Appellate Division's holding in *Morton*, Liberty Mutual and its co-cross-petitioners stated:

> At the outset, Respondents emphasize that the Appellate Division correctly decided that there was not coverage for the underlying claims because there was no accident or occurrence. However, in doing so, the Appellate Decision declined to correct its prior erroneous decisions with respect to the pollution exclusion, and indeed, the Appellate Division reaffirmed its prior rulings on this exclusion.

> These prior erroneous decisions need to be corrected by this Court.
>
> Respondents [Liberty Mutual] ask this Court to address the "pollution exclusion" and, in particular, *to rule* that the *pollution exclusion applies to the discharge of pollutants and not to the damage that results from a discharge*.
>
> * * * * *
>
> Notwithstanding, lower courts of this state have continued to follow the outmoded precedent of the Appellate Division with respect to the pollution exclusion, which precedent is contrary to the view of the substantial majority of jurisdictions to have addressed the issue. In fact, the Respondents in this appeal asked the Appellate Division to correct these prior rulings; the Appellate Division declined to do so, but expressly left it for this Court to clarify the law.

Cross-Petition for Certification to the New Jersey Supreme Court of Liberty Mutual, A-50. (emphasis and brackets added).

Petitioners argued before the Fourth Circuit that the decisions of New Jersey's trial and intermediate appellate courts necessitated the reading of the "sudden and accidental" language such that it would be applied to the "damage" caused by the pollution, and not to the "discharge." Conversely, Liberty Mutual and its Co-Cross-Petitioners in *Morton* have asked the New Jersey Supreme Court "to rule that the pollution exclusion clause applies to the *discharge* of pollutants and not to the *damage* that resulted from the discharge." A-50. Hence, Liberty Mutual Insurance Company, Respondent in this case and Cross-Petitioner in *Morton*, admits and acknowledges that the very same issue is critical in both cases and is of great significance for insurers and insureds alike throughout the United States.

As recently noted by the Appellate Division in the case of *Diamond Shamrock Chemical Co. v. Aetna Casualty & Surety Co.*, No. A-694-89T1, 1992 WL 89112

(N.J. App. Div. Apr. 6, 1992), there is a considerable "degree of disarray in the decisional treatment"[3] of this question throughout the Nation[4], but concluded that "other than noting the litigation explosion that has been generated by the ambiguous wording of the pollution exclusion, we need not further address the issue." *Id.* at 45.

It is logical that a decision by the New Jersey Supreme Court construing the pollution exclusion clause should be applicable to both the instant case, as well as *Morton*. It would be anomalous and unfair if Liberty Mutual and Triangle were deprived of the New Jersey Supreme Court's guidance in this case when Liberty Mutual has sought such guidance directly from the Supreme Court of New Jersey in the *Morton* case. Accordingly, this Court should grant the Petition for a Writ of *Certiorari* and allow the final determination of the issue by the New Jersey Supreme Court in *Morton* to settle this important environmental insurance coverage dispute between Triangle and its insurers in the instant case. To do otherwise, we respectfully submit, would be manifestly unjust. In light of the granting of the Cross-Petition for Certification by the New Jersey Supreme Court in *Morton*, the First Circuit's decision in *CPC International, Inc.* and prior rulings of New Jersey's lower courts, it is critical that this Court accept jurisdiction over this matter.

Indeed, the First Circuit's decision of March 24, 1992 in the case of *CPC International, Inc. v. Northbrook Excess and Surplus Insurance Co.*, Nos. 91-1580 and 91-1734, which involved an appeal from an Order of a Rhode Island District Court granting summary judgment in favor of an insurance company, based upon the application of New Jersey law to the identical pollution

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3. *Id.* at 38 (quoting *Vantage Dev. Corp., Inc. v. American Env. Tech. Corp.*, 251 N.J. Super 516, 531 (Law Div. 1991))

4. Indeed, one of the many cases noted by the Appellate Division was this very case. *Diamond Shamrock* at 41.

exclusion clause addressed by the Fourth Circuit in this case, compels this Court to accept jurisdiction. The First Circuit, in reversing the district court and deciding in favor of coverage for the insured, relied upon many of the same cases upon which Petitioners rely and establishes that reasonable minds can differ as to the resolution of the coverage issue. Regardless of whether the decision of the New Jersey Supreme Court in *Morton* determines that the Fourth Circuit, or the First Circuit, correctly predicted what the New Jersey Supreme Court's determination of this insurance issue would be, it is in the interest of justice, fairness and equity for this Court to accept jurisdiction, grant the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit, and ultimately stay all further proceedings pending the decision of the New Jersey Supreme Court in *Morton*.

II. UNDER NEW JERSEY LAW, THE SUDDEN AND ACCIDENTAL EXCEPTION TO THE POLLUTION EXCLUSION CLAUSE IN A COMPREHENSIVE GENERAL LIABILITY ("CGL") POLICY APPLIES TO THE "POLLUTION DAMAGE," RATHER THAN TO THE "DISCHARGE" OF THE CONTAMINANTS. THEREFORE, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT MISAPPLIED THE STANDARDS ANNOUNCED BY THIS COURT IN *SALVE REGINA COLLEGE V. RUSSELL*, AND *C.I.R. V. BOSCH'S ESTATE*, THEREBY RESULTING IN AN ERRONEOUS PREDICTION AS TO HOW THE NEW JERSEY SUPREME COURT, THE FINAL ARBITER OF NEW JERSEY STATE LAW, WOULD DECIDE THIS QUESTION.

A. FEDERAL COURTS ARE BOUND BY THE DECISIONS OF NEW JERSEY'S TRIAL AND INTERMEDIATE APPELLATE COURTS WHICH HAVE PREVIOUSLY ADDRESSED THIS ISSUE OF INSURANCE COVERAGE FOR ENVIRONMENTAL CLAIMS UNDER NEW JERSEY LAW.

This case is to be decided based upon New Jersey's substantive law.[5] Petitioners contend that there is no doubt that the New Jersey Supreme Court, when faced with the issues raised in this case, will hold that Petitioners are entitled to coverage under each of the insurance policies at issue.

In the case of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71 (1938), this Court made it clear that the federal courts must *predict* how the New Jersey Supreme Court would decide this case, not how the highest courts of the states or other federal courts might decide this case. *Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217, 1226, 113 L.Ed.2d 190 (1991). (J. Rehnquist dissenting on other issues.) Both *Erie* and *Salve Regina* interpret 28 U.S.C. §1652, which provides:

> The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

This statute was formerly codified at 28 U.S.C. §1725.

In predicting how New Jersey's Supreme Court would decide this case, a federal court should examine the following factors: (1) decisions of the New Jersey Supreme Court in related areas of law; (2) decisions of intermediate and lower courts of the State of New Jersey; (3) decisions of the federal courts interpreting New Jersey law; (4) decisions of other jurisdictions on the "majority" rule; (5) law review commentaries and restatements of law; and (6) other relevant data. *See Grantham and Mann, Inc. v. American Safety Products,*

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5. The West Virginia Supreme Court of Appeals, in responding to certified questions from Judge Kidd of the United States District Court for the Northern District of West Virginia in this case, concluded that under West Virginia's conflict of law rules, New Jersey law would govern the interpretation of these insurance contracts. *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*, 380 S.E.2d 562 (W.Va. 1990).

Inc., 831 F.2d 596, 608 (6th Cir. 1987); *Gruber v. Owens-Illinois Inc.*, 899 F.2d 1366 (3d Cir. 1990).

It would be inappropriate for a federal court to fail to apply New Jersey law as it finds it, even if the federal court might consider a contrary ruling to be a better resolution of the issues presented:

> [O]ur Judicial chore is to "determine the rule that the North Carolina Supreme Court would probably follow, not fashion a rule which we, as an independent federal court, might consider best."

Kline v. Wheels by Kinney, Inc., 464 F.2d 184 (4th Cir. 1972), *quoting from Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co.*, 319 F.2d 469, 472 (4th Cir. 1963).

The *Erie* doctrine of applying state law in diversity cases furthers the twin aims of: (1) discouraging forum-shopping and (2) avoiding the inequitable administration of the laws. *Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217, 1222, 113 L.Ed.2d 190 (1991) quoting *Hanna v. Plumer*, 380 U.S. 460, 468, 85 S.Ct. 1136, 1142, 14 L.Ed.2d 8 (1965). The Supreme Court of Appeals of West Virginia has previously determined, in answering certified questions posed by Judge Kidd, that New Jersey law should be applied. *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*, 390 S.E.2d 562 (1990). Accordingly, a federal court deciding the relevant coverage issue should be deciding that issue no differently than if it were pending in the state courts of New Jersey. Any contrary result would reward forum shopping and undermine the integrity of the concurrent jurisdiction of the federal and state systems.

To effectuate the twin goals of the *Erie* doctrine, the Fourth Circuit was required to review the District Court's determination of New Jersey state law, *de novo*, and without giving deference to the District Court's conclusions regarding New Jersey state law. *Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217, 1222, 113 L.Ed.2d 190 (1991). There should not be a "dual system of enforcement of state-created rights in

which the substantive rule applied to a dispute may depend on the choice of forum." *Id.* at ___, 111 S.Ct. at 1222.

It is important to note that in the absence of persuasive evidence to the contrary, the federal courts are bound by decisions of the lower courts of a state which have addressed the matters in question. *C.I.R. v. Bosch's Estate*, 387 U.S. 456, 463, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967). In fact, the Fourth Circuit's own decision in *Hupman v. Cook*, 640 F.2d 497 (4th Cir. 1981) made it clear that in evaluating state law:

> [I]t is well to remember that, in this diversity action, the expressions of the Virginia courts are *due great deference*. If we can discover the answer they would give to the questions, it must control, regardless of our personal predilections for a contrary concept.

Id. at 497. (emphasis added).

Accordingly, this Court and the federal courts below are bound by the decisions of the New Jersey courts regarding the interpretation of the sudden and accidental exception to the pollution exclusion clause in a Comprehensive General Liability ("CGL") policy and its application to the "discharge of" contaminants, as opposed to the "pollution damage." Neither the United States Court of Appeals for the Fourth Circuit, nor the United States District Court for the Northern District of West Virginia, analyzed New Jersey State law in accordance with the standards set forth in the cases of *Salve Regina* and *Bosch*. Had the District Court and the Court of Appeals properly applied the rules of these cases, they would have decided in favor of Petitioners.

B. THE DECISIONS OF NEW JERSEY'S TRIAL AND INTERMEDIATE APPELLATE COURTS REQUIRE THAT THE COVERAGE ISSUE IN THE INSTANT CASE MUST BE RESOLVED IN FAVOR OF THE PETITIONERS.

The District Court in this case properly concluded that Petitioners: (1) did not "intend or expect" to cause

property damage; (2) that there was an "occurrence" within the meaning of the policies in question; (3) that "property damage" had occurred during that period; and (4) that the clean-up costs were "damages" – all within the meaning and within the policy periods of the Comprehensive General Liability ("CGL") policies issued by Ideal Mutual and Liberty Mutual. Neither Petitioners nor Respondents sought review of these issues decided by the District Court. The error of the courts below involves the application of the relevant New Jersey law to the interpretation of the standard pollution exclusion clause. The policy provision to be interpreted in the relevant CGL policies states that:

> This insurance does not apply . . . to . . . property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is *sudden and accidental*.

A-31. (emphasis added).

New Jersey law, as expressed by the New Jersey Supreme Court, is well settled regarding the general standards of interpreting insurance policies. The polestar of insurance contract interpretation under New Jersey law is the effectuation of the reasonable expectations of the policyholders. *Meier v. New Jersey Life Ins. Co.* 101 N.J. 597, 612, 503 A.2d 862 (1986); *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 305, 208 A.2d 638 (1965) (holding that insurance policy language should be interpreted strictly against the insurer and where several interpretations are permissible, the New Jersey Supreme Court has chosen the one most favorable to the policyholder); *Kievit v. Loyal Protective Life Ins. Co.*, 34 N.J. 475, 482, 170 A.2d 22 (1961) (holding that the New Jersey Supreme Court will not allow

technical encumbrances or hidden pitfalls from providing coverage and that policyholders should be afforded coverage to the full extent that any fair interpretation will allow); *Broadwell Realty Services, Inc. v. Fidelity and Casualty Co.*, 218 N.J. Super. 516, 524, 528 A.2d 76 (App. Div. 1987). Insurance contracts are considered "contracts of adhesion" because they are prepared by the company's experts who are learned in the law of insurance. *Meier*, *supra*, 101 N.J. at 611-612; *Mazzilli v. Accident & Cas. Ins. Co. of Winterthur*, 35 N.J. 1, 7, 170 A.2d 800 (1961) (holding that where the controlling language of an insurance policy will support two meanings, one favorable to the insurer and the other favorable to the insured, the interpretation sustaining coverage must be applied); *Broadwell Realty*, *supra*, 218 N.J. Super. at 523-524.

The New Jersey Supreme Court has declared that the interpretation of insurance contracts be guided by the principle that "doubts as to the existence or extent of coverage must generally be resolved *in favor of the insured*." *Mazzilli*, *supra*, 35 N.J. at 8; *Broadwell Realty*, *supra*, 218 N.J. Super. at 524 (emphasis added). Where several interpretations of policy language are permissible, New Jersey courts have chosen the one most favorable to the policyholder. *Allen*, 44 N.J. at 305; *Broadwell Realty*, *supra*, 218 N.J. Super. at 525. The New Jersey Supreme Court has even gone so far as to declare that *unambiguous* policy language may be interpreted *contrary to its plain meaning* if this would fulfill the reasonable expectations of a policyholder in purchasing such insurance. *See Werner Industries, Inc. v. First State Ins. Co.*, 112 N.J. 30, 35-36, 548 A.2d 188 (1988).

C. UNDER NEW JERSEY LAW, THE POLLUTION EXCLUSION CLAUSE'S EXCEPTION FOR "SUDDEN AND ACCIDENTAL" POLLUTION HAS BEEN INTERPRETED TO BE A RESTATEMENT OF THE DEFINITION OF "OCCURRENCE" AND TO PROVIDE INSURANCE COVERAGE FOR THE UNINTENDED RESULTS OF INTENTIONAL ACTS.

New Jersey's trial and intermediate appellate courts have interpreted the "sudden and accidental" language contained in the pollution exclusion clause to apply to the pollution *damage*, rather than to the *discharge, dispersal, release or escape of a contaminant*. *Broadwell Realty Services, Inc. v. Fidelity and Casualty Co.*, 218 N.J. Super. 516, 524, 528 A.2d 76 (App. Div. 1987). New Jersey's Appellate Division has interpreted the pollution exclusion's exception for "sudden and accidental" pollution to provide coverage for the intentional disposal of waste that resulted in unintended and unexpected pollution. Only an active and deliberate polluter who knew its waste was hazardous and would leak or leach out of a landfill will be denied coverage. This reading of the sudden and accidental exception to the pollution exclusion clause is confirmed by the decision of New Jersey's Appellate Division in *Broadwell Realty*:

> [D]ecisional law in New Jersey and elsewhere has tended to interpret the pollution exclusion and, more particularly, the "sudden and accidental" exception as "simply a restatement of the definition of 'occurrence' - that is, that the policy will cover claims where the injury was 'neither expected nor intended.'" It is a reaffirmation that coverage will not be provided for expected and hence avoidable results.
>
> We agree with this analysis.

Broadwell Realty at 534-535, quoting *Jackson Township Municipal Utilities Authority v. Hartford Acc. & Indem. & Co.*, 186 N.J. Super. 156, 164, 451 A.2d 990 (Law Div.

1982). (Other citations omitted). The trial court in *Jackson Township* held that:

> Viewed from the standpoint of the Municipal Utilities Authority, the function of depositing the waste may have been intentional but it was never expected or intended that the waste would seep into the aquifer resulting in damage and injury to others. An ambiguity thus exists. Alternative language in the clause to indicate that the act of depositing, if intentional, would exclude coverage regardless of whether the pollution is expected or intended, would have put the matter beyond reasonable question.

186 N.J. Super. 156, 164-5 (Law Div. 1982). Merely causing waste to be deposited off-site does not place a generator of waste in the class of those who expect or intend that the disposal of their waste will result in injury or damage. Given that Petitioners thought the wastes were non-toxic as reflected in Petitioners' letter of May 14, 1979, A-42, it is clear that Petitioners never expected or intended the shipment of its waste sludge to the Buckeye Landfill to cause any damage.

Disposing of waste through independent waste haulers further removes a company from expecting or intending injury or damages to occur. In *CPS Chemical Co. v. Continental Ins. Co.*, 199 N.J. Super. at 558 (Law Div. 1984), *rev'd on other grounds*, 203 N.J. Super. 15 (App. Div. 1985), the insured sought coverage under its insurance policies for claims made against it by the City of Philadelphia for the allegedly illegal dumping of toxic waste at a City dump. *Id.* at 562. CPS had turned over its waste to a hauler called "ABM" which proceeded to dispose of the waste at a dump in Philadelphia. *Id.* Among the claims asserted against CPS Chemical were violations of CERCLA. *Id.* These facts are essentially the same as those in the present case in which the Petitioners turned waste over to hauling companies. *See* A-3. The Law Division Judge in *CPS Chemical* concluded that there would be coverage for the unintended results

of intentional acts, but there would not be coverage for the intended results of intentional acts. *Id.* at 565. In other words, if a hauler improperly disposed of waste such that a release of toxic chemicals resulted and the release of the toxic chemicals was not intended by the insured, there would be coverage. *Id.*

Although the District Judge in this case concluded that Petitioners intentionally disposed of the waste in the sense that they knowingly sent the sludge to the Buckeye Landfill, he recognized that Petitioners did not expect or intend that its waste would cause pollution. A-22.

One of the earliest New Jersey cases which addressed the issue of insurance coverage for environmental claims was *Lansco, Inc. v. Department of Environmental Protection*, 138 N.J. Super. 275, 350 A.2d 520 (Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *certif. denied*, 73 N.J. 57, 372 A.2d 322 (1977). *Lansco* was the law in New Jersey at the time these policies of insurance were *issued,* a factor which bears emphasis. Indeed, at the time that Triangle *shipped* the sludge to the landfill in this case, November, 1977 to October, 1980, *Lansco* was the law in New Jersey. Moreover, when each of the subject policies was issued containing the standard pollution exclusion clause that "sudden and accidental" releases were covered by CGL insurance, the law of New Jersey, which is to be used to interpret the meaning of the policies in question, required that the phrase "sudden and accidental" be interpreted to mean "unexpected and unintended" from the standpoint of the insured. Accordingly, Triangle's reasonable expectations, the polestar of insurance policy interpretation under New Jersey law[6], were certainly that such claims would be covered by these insurance policies as interpreted by the Court in *Lansco*. The *Lansco* Court found specifically that the words of

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6. *Meier v. New Jersey Life Insur. Co.*, 101 N.J. 597, 612, 503 A.2d 862 (1986).

the policy must be interpreted in accordance with their plain, ordinary meaning - not in any technical or specialized way:

> Words used by the insurer must be interpreted in accordance with the plain, ordinary and commonly understood meaning of the language employed.

Id. at 281-282. The *Lansco* Court went on to find the terms "sudden" and "accidental" meant "unexpected" and "unintended." *Id.* at 282. The Court went further to conclude that the spill of the oil, which was not expected or intended by the insured, was covered:

> Further, under the definition of "occurrence" contained in the policy whether the occurrence is accidental must be viewed from the standpoint of the insured, and since the oil spill was neither expected nor intended by Lansco, it follows that the spill was sudden and accidental under the exclusion clause even if caused by the deliberate act of a third party.

Id. at 282. *Lansco* would clearly inform a prospective purchaser of insurance that under New Jersey law, "sudden and accidental" means "unexpected and unintended." Therefore, under the uncontroverted facts of this case, Petitioners neither expected nor intended any environmental damage, and thus should be afforded coverage under the CGL policies.

That this reading of the sudden and accidental exclusion to the pollution exclusion clause of the CGL policies would be endorsed by the New Jersey Supreme Court is indicated by that Court's reliance upon *Lansco* in *State Dept. of Environmental Protection v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150 (1983), in which the court held that strict liability under *Rylands v. Fletcher*, L.R. Ex. 265 (1866), *aff'd* L.R. 3 H.L. 330 (1888), applied in toxic tort cases in New Jersey. *See State Department of Environmental Protection v. Ventron Corp.*, 94 N.J. 473, 494, 495, 468 A.2d 150 (1983)

(citing *Lansco* for support). Numerous other court decisions and law review articles have cited *Lansco* in support of finding "sudden and accidental" to mean "unexpected and unintended." *See SL Industries v. American Motorists*, 248 N.J. Super. 458, 465, 591 A.2d 677 (App. Div. 1991), holding that "coverage will not be provided for intended results, but will be provided for the unintended and unforeseen results of an intentional act," *citing Ambassador Insurance Company v. Montes*, 76 N.J. 477, 388 A.2d 603 (1978), in which the Supreme Court of New Jersey found coverage under the language of a CGL policy where the insured had been convicted of arson.

The "sudden and accidental" language means "unexpected and unintended" under New Jersey case law. Petitioners allegedly intentionally disposed of the sludge by means of hiring a waste handler to transport it to a landfill, but, as was found by the District Court and affirmed by the Court of Appeals, Petitioners neither expected nor intended that the waste would cause pollution. Thus, under the current law in New Jersey, the Fourth Circuit should have found that Petitioners had insurance coverage under the CGL policies in issue. It is probable that the New Jersey Supreme Court will adopt the *Lansco* analysis and interpret the language to apply to the facts of this matter. At present, *Lansco* is the law of New Jersey.

Ironically, on March 2, 1992, the day on which the United States Court of Appeals for the Fourth Circuit filed its decision and order in this case, the New Jersey Supreme Court granted certification on this exact issue of New Jersey law, involving the interpretation and application of the "sudden and accidental" exception to the original pollution exclusion clause contained in CGL policies in the case of *Morton International, Inc. v. General Accidental Insurance Co. of America*, No. 34,341, (N.J. Sup.Ct. *certif. granted*, March 2, 1992). Another irony is that Respondent, Liberty Mutual, was

among the parties in *Morton*, who sought review of this issue by the New Jersey Supreme Court.

The decision of the New Jersey Supreme Court in *Morton* will finally establish the rule of law which is controlling in this case. This Court has the power to give the parties to this action the benefit of the New Jersey Supreme Court's decision, by accepting jurisdiction, granting this Petition for Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit and staying these proceedings pending the decision in the *Morton* case.

The insurers in the present case have been hard pressed to find even one New Jersey Supreme Court or Appellate Division case on point contrary to the clear decisions of *Broadwell Realty*, *Jackson Township*, *CPS Chemical* and *Lansco*. New Jersey's appellate courts have established a substantial body of precedent on questions relating to insurance coverage in the context of environmental claims. In fact, no state has more decisions on point in this area of the law than New Jersey. For the insurance companies in this case to ultimately prevail on the merits, they must persuade this Court, as they did the United States Court of Appeals for the Fourth Circuit, to ignore not just one, two or a few significant decisions of the lower courts in New Jersey (all of which are based on clear precedent as announced by the New Jersey Supreme Court in earlier cases of a similar nature), but must persuade this Court that New Jersey's Supreme Court will ignore the substantial body of existing New Jersey law and rule directly to the contrary when it renders its decision in *Morton*. It is unlikely that the New Jersey Supreme Court will ignore the decisions of *Broadwell Realty*, *Jackson Township*, *CPS Chemical*, *Lansco* and others when it decides this issue.

Respondent, Liberty Mutual, which specifically requested that this issue be resolved by the New Jersey Supreme Court in its cross-petition for certification in *Morton*, will suffer no prejudice or detriment of any kind

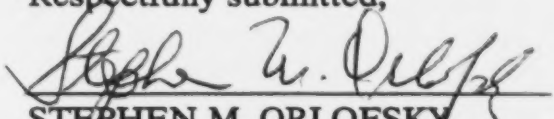
whatsoever if this Petition for a Writ of *Certiorari* is granted and these proceedings stayed pending the decision of the New Jersey Supreme Court in *Morton*. Indeed, the fact that Liberty Mutual cross-petitioned in *Morton* to have this issue finally resolved by the New Jersey Supreme Court reflects its desire to have this troublesome question settled.

CONCLUSION

For the reasons specified above, a Writ of *Certiorari* should be issued to the United States Court of Appeals for the Fourth Circuit in this matter, and the proceedings of this Court stayed, pending the decision of the New Jersey Supreme Court in *Morton*.

In the alternative, the Writ should be issued and the decision of the Fourth Circuit reversed because it erroneously predicted how the New Jersey Supreme Court would decide this issue of New Jersey law under the standards announced by this Court in *Salve Regina*.

Respectfully submitted,



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Dated: 5/29/92

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiff-Appellee,

v.

TRIANGLE INDUSTRIES, INCORPORATED, a/k/a ANC Holdings, Incorporated; TRIANGLE PWC, INCORPORATED,
Defendent & Third Party Plaintiffs-Appellants,

v.

NEW JERSEY PROPERTY-LIABILITY GUARANTY ASSOCIATION, on behalf of Ideal Mutual Insurance Company, in liquidation; ZURICH-AMERICAN INSURANCE COMPANIES; ZURICH INSURANCE COMPANY,
Third Party Defendants-Appellees,

and

WAUSAU INSURANCE COMPANIES; EMPLOYERS INSURANCE OF WAUSAU,
Third Party Defendants.

WESTINGHOUSE ELECTRIC CORPORATION; INTERNATIONAL BUSINESS MACHINES CORPORATION; OLIN CORPORATION; AMERICAN FIBER MANUFACTURERS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; CHEMICAL MANUFACTURERS ASSOCIATION; INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION,
Amici Curiae.

No. 91-1685

Appeal from the United States District Court
for the Northern District of West Virginia, at Wheeling.
William M. Kidd, Senior District Judge.
(CA-88-41-W-K)

Argued: December 3, 1991

Decided: March 2, 1992

Before ERVIN, Chief Judge, NIEMEYER, Circuit Judge, and SHEDD, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Chief Judge Ervin and Judge Shedd joined.

COUNSEL

ARGUED: Stephen M. Orlofsky, BLANK, ROME, COMISKY & MCCAULEY, Cherry Hill, New Jersey, for Appellants. Lee Hadas Glickenhaus, MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, P.C., Boston, Massachusetts, for Appellees. **ON BRIEF:** Carlo Scaramella, BLANK, ROME, COMISKY & MCCAULEY, Cherry Hill, New Jersey, for Appellants. William F. Greaney, COVINGTON & BURLING, Washington, D.C. for Amici Curiae American Petroleum Institute and Chemical Manufacturers Association; H. Woodruff Turner, Peter J. Kalis, David M. Aceto, Thomas M. Reiter, William J. Pohlman, KIRKPATRICK & LOCKHART, Pittsburgh, Pennsylvania, for Amici Curiae Westinghouse Electric Corporation, American Fiber Manufacturers Association, International Business Machines Corporation, and Olin Corporation.

OPINION

NIEMEYER, Circuit Judge:

The question of whether insurance provides coverage for pollution damage is currently an important one that has far-reaching financial implications.[1] The answer determines who in the first instance bears the cost of pollution cleanup, although we recognize that it does not ultimately relieve the entire economy of the financial burden. In this case we conclude that certain insurance policies, interpreted in accordance with the law of New Jersey, do not provide coverage for the unintended environmental damage which allegedly continues to arise from the past regular surface disposal in a landfill of the waste products of a standard manufacturing process. We therefore affirm the judgment of the district court.

I

Triangle Industries, Inc., and its subsidiary, Triangle PWC, Inc., (collectively referred to as "Triangle") were involved in the fabrication of wire and cable at a processing plant in Glen Dale, West Virginia. As part of the fabrication process, Triangle utilized a method of "pickling" the steel used to make its wires and cables which produced a waste product known as "lime-stabilized waste pickle liquor sludge." Between November 1977 and October 1980, this lime-stabilized waste pickle liquor sludge was trucked by an independent contractor from the Triangle plant in West Virginia to a landfill near St. Clairsville, Ohio, where it was poured onto the ground.[2] Shortly after Triangle ceased dispos-

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1. In this regard, we received amicus curiae briefs from Insurance Environmental Litigation Association on behalf of 19 insurance companies and from Westinghouse Electric Corporation, International Business Machines Corporation, Olin Corporation, American Fiber Manufacturers Association, American Petroleum Institute, and Chemical Manufacturers Association.

2. We can suppose that in that lime-stabilized waste pickle liquor sludge "the slithy toves [d]id gyre and gimble." *See* Lewis Carroll, "Jabberwocky," from *Through the Looking Glass,* Ch. 1 (1872).

ing of the sludge at the site, the Ohio Environmental Protection Agency conducted tests and discovered that hazardous materials were leaking from the landfill.

After conducting some of its own tests, on December 7, 1984, the United States Environmental Protection Agency notified Triangle, as well as other companies, that it considered them "potentially responsible parties" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.* (1988). On October 3, 1985, Triangle and the other potentially responsible parties entered into an administrative consent agreement with the federal agency, in which the companies agreed to begin cleaning up the site.

From January 1, 1981, to April 4, 1987, Triangle maintained a number of insurance policies with three different insurers. All of the policies include covenants to defend and indemnify Triangle against covered property damage, but each policy also expressly excludes coverage for certain categories of pollution damage.

While the particular language of spcific policies will be discussed later in some detail, it is useful to note at this point that this case involves, generally, three categories of insurance coverage. First, there are comprehensive general liability policies which contain what will be termed the "original" pollution exclusion clause. One of these policies, issued by Ideal Mutual Insurance Company, covered the years 1981 and 1982. The other, issued by Liberty Mutual Insurance Company, covered the period from January 1, 1982, to July 1, 1982. Second, there are comprehensive general liability policies with a "modified" pollution exclusion clause. Liberty Mutual issued policies of this type to Triangle, covering the period from July 1, 1982, to January 1, 1984. Afterwards, Zurich Insurance Company issued such policies covering the period from January 1, 1984, to April 1, 1987. Third, Zurich issued to Triangle a "claims-made" pollution liability insurance policy with a clause excluding

certain sites, which covered the period from May 15, 1984, to May 15, 1985.

On March 7, 1985, Triangle notified all of its insurers that it had been named a potentially responsible party and asked that they bear Triangle's investigatory and legal expenses, furnish Triangle a defense in its attempt to avoid or minimize, through litigation, the requirement of paying for the extensive enviornmental cleanup, and indemnify Triangle for actual cleanup costs. Of course, Triangle conceded "a reservation of rights by the carriers as to their ultimate responsibilities for indemnification." Because Ideal Mutual was in receivership, the receiver, New Jersey Property-Liability Guaranty Association, responded to Triangle, denying coverage under the policy with Ideal Mutual. Zurich responded on April 1, 1985, explaining that it questioned whether the pollution damage in Ohio was covered by its policies, but would handle "this matter under a full and complete reservation of rights." However, on August 28, 1985, Zurich withdrew its participation in Triangle's defense, effective October 1, 1985. Liberty Mutual responded on February 27, 1986, after Triangle sent them a second letter, agreeing to participate in Triangle's defense despite reservations regarding indemnity. Liberty Mutual continued to assist in Triangle's defense until February 1, 1988, when Liberty Mutual concluded that Triangle was not covered by any of its policies and so too withdrew its defense.

Shortly thereafter, Liberty Mutual brought this diversity action, asking for a declaratory judgment that it owes no duty to defend Triangle. Triangle asserted counterclaims and third-party claims against the other insurers, seeking a declaration that a defense is owed.

The district court certified legal questions to the West Virginia Supreme Court of Appeals, which replied that, under West Virginia's choice-of-law rules, New Jersey law governs the interpretation of all of the insurance contracts. Subsequently, on cross motions for

summary judgment, the district court held that although the environmental damage allegedly caused by dumping Triangle's sludge into the Ohio landfill was neither intended nor expected by Triangle, none of the insurance policies covered such damages by reason of pollution exclusions. This appeal followed.

II

Before beginning our analysis of the various insurance policies which are at issue in this appeal, we note that a federal court sitting in diversity has a duty to apply the operative state law as would the highest court of the state in which the suit was brought. Having certified the question to the highest court of West Virginia and thereby determined that the law of New Jersey governs the construction of each of Triangle's insurance contracts, it was the duty of the district court, as it is ours, to interpret these instruments as would the New Jersey Supreme Court. *See Brendle v. General Tire & Rubber Co.,* 505 F.2d 243, 245 (4th Cir. 1974).

The best evidence to this effect would be, of course, a decision by the highest court of New Jersey which addresses the contract interpretation issues now before us, but that court has not spoken to many of these questions. In such circumstances, the state's intermediate appellate court decisions "constitute the next best indicia of what state law is," although such decisions "may be disregarded if the federal court is convinced by other persuasive data that the highest court of the state would decide otherwise." 19 Charles A. Wright, Arthur R. Miller & Edward H. Cooper *Federal Practice & Procedure* § 4507, at 94-95 (1982). *See also West v. American Tel. & Tel. Co.,* 311 U.S. 223, 237 (1940). In predicting a decision of the state's highest court we can further consider, among other things, canons of construction, restatements of the law and treatises that are regularly applied by the courts of the state and whose use for a particular purpose is approved by the state's highest court, *see Fried v. North River Ins. Co.,* 710 F.2d

1022, 1025 (4th Cir. 1983), *and General Elec. Co. v. Sargent & Lundy,* 916 F.2d 1119, 1125 (6th Cir. 1990), recent pronouncements of general rules or policies by the state's highest court, *see Woodruff v. Tomlin,* 616 F.2d 924, 930 (6th Cir.), *cert. denied,* 449 U.S. 888 (1980), or even that court's well considered dicta, *see* 19 Wright, Miller & Cooper, *supra*, at 97. Decisions of the state's trial courts may also be considered to provide some light upon the subject. *See id.* at 96.

Finally, we note that the determination of state law by the district court is to be reviewed by us de novo. *See Salve Regina College v. Russell,* 111 S.Ct. 1217, 1221 (1991).

III

We begin our analysis of the insurance contracts at issue in this case with the comprehensive liability policies which include what we term the "original" pollution exclusion. Under these policies, which were issued to Triangle in 1981 and 1982 by Ideal Mutual and Liberty Mutual, insurance coverage is predicated upon the happening of an "occurrence," defined as an accident, including continuous or repeated exposure to conditions, which results in . . . *property damage neither expected nor intended* from the standpoint of the insured.

(Emphasis added.) The district court found, and neither party disputes, that the environmental *damage* allegedly caused by the disposal of Triangle's waste materials was unexpected. Thus the case is placed within the basic coverage of the comprehensive liability policies.

However, these comprehensive liability policies include a standard exclusion for damage caused by certain forms of pollution. This "original" pollution exclusion removes from coverage

> property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon

> land, the atmosphere or any water course or body of water; *but* this exclusion *does not apply* if such *discharge,* dispersal, release or escape *is sudden and accidental.*

(Emphasis added.) Once again, for purposes of this appeal there is no dispute that the environmental damage in this case arose from the discharge of pollutants upon the land, bringing this case within the initial precepts of the exclusion. The critical issue before us thus is whether the exception to the exclusion also applies, i.e., was "such discharge . . . sudden and accidental"?

Triangle argues that the New Jersey lower court opinions require us to read the "sudden and accidental" language in the exclusion as applying to the pollution *damage* rather than to the *discharge, dispersal, release or escape* of the contaminant. While there are appellate court decisions in New Jersey that support such a view, *see, e.g., Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.,* 528 A.2d 76, 85 (N.J. Super. Ct. App. Div. 1987), we are firmly persuaded that the highest court of New Jersey would not concur with these opinions. First, the plain language of the policy makes clear that the "exclusion does not apply if *such discharge, dispersal, release or escape* [as distinct from the *damage* caused] is sudden and accidental." While New Jersey law reads ambiguities in favor of the insured, it does not "write for the insured a better policy of insurance than the one purchased." *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.,* 562 A.2d 208, 214 (N.J. 1989). Furthermore, given that the *basic* coverage of these policies is afforded for an occurrence defined as a condition giving rise to unintended damages, a reading of the subsequent language which excludes from the basis coverage all releases of pollution *except* those which cause unintended *damages* simply restates the basic coverage and writes the pollution exclusion *completely* out of the contract. *See Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co.,* 451 A.2d 990, 994 (N.J. Super. Ct. Law Div.

1982) ("[T]he clause can be interpreted as simply a restatement of the definition of 'occurrence' "). This construction violates a fundamental and long-standing principle that, where possible, meaning will be given to all of the clauses of an insurance policy. *See Smith v. Fidelity & Deposit Co.,* 120 A. 322, 323 (N.J. 1923). As New Jersey's highest court stated in *Prather v. American Motorists Ins. Co.,* 67 A.2d 135, 138 (N.J. 1949), "Effect, if possible, will be given to all parts of the instrument, and the construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable."

Finally, at least one opinion on which the *Broadwell* court appears to have relied in making its conclusion that the "sudden and accidental" language refers to the *damages* rather than the *discharge* of pollutants, *see Broadwell,* 528 A.2d at 83, in fact focused on whether the *discharge* of the pollutant was intended, rather than on the injury resulting from the discharge. *See Lansco, Inc. v. Dep't. of Envtl. Protection,* 350 A.2d 520, 524 (N.J. Ch. 1975) ("[S]ince the *spill* was neither expected nor intended . . . it follows that the oil *spill was sudden and accidental* under the exclusion clause . . . ."), *aff'd* 368 A.2d 363 (N.J. Super. Ct. App. Div. 1976) (per curiam). Thus we believe that the Supreme Court of New Jersey would conclude from the language of these policies that (1) basic coverage arises from the occurrence of unintended damages; but (2) such damages as arise from the discharge of various pollutants are excluded from this basic coverage; except that (3) damages arising from the discharge of these pollutants will fall within the coverage of these policies where such *discharge is sudden and accidental.*

To apply this construction to the facts of this case, we ask initially whether the discharge of the toxic sludge upon the ground at the landfill in St. Clairsville, Ohio, was an act expected or intended by Triangle. If so, the discharge could not be "accidental," and the resulting

damage, even though unintended, would be excluded from coverage under the language of the pollution exclusion.

While Triangle points to a substantial quantity of evidence which tends to support the fact that Triangle did not know of the *harm* that would be caused by dumping its waste products at the Ohio landfill, no evidence was presented to the court below to demonstrate that Triangle did not expect and intend its sludge to be dumped upon the ground at the landfill. The sludge was a normal by-product of Triangle's manufacturing operation. The company hired trucks to haul the waste to the Ohio landfill. And Triangle corresponded with persons at the landfill, discussing the liquidity of the semi-solid sludge being dumped at the fill. Given this, we agree with the district court that the open dumping of a sludge onto the ground, particularly when performed as part of a regular business activity, cannot be considered an accidental discharge of the contaminant. Under the law of New Jersey, we therefore conclude that the losses sustained by reason of such an operation are not covered by the Liberty Mutual and Ideal Mutual comprehensive general liability policies containing the original pollution exclusion (with the "sudden and accidental" language).

IV

We next address the comprehensive general liability policies, issued by Liberty Mutual and Zurich, which contain what we term the "modified" pollution exclusion language. As was the case with the policies containing the "original" pollution exclusion, basic coverage under the policies with the "modified" pollution exclusion is not questioned. As before, the issue on appeal is whether the pollution exclusion language removes the damages arising in this case from the coverage of these policies.

The modified language excludes coverage for

> property damage arising out of the discharge,

> dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; *but* this exclusion *does not apply to* bodily injury or property *damage included within the product hazard or the completed operations hazard* if the discharge, dispersal, release, or escape originates away from premises owned by, rented or loaned to a named insured.

(Emphases added.) These terms make clear that *all* releases of pollutants are excluded from the coverage of these policies unless such releases are included within the "product hazard" or the "completed operations hazard" which is covered by the policy.

The term "product hazard" is a standard one in the insurance industry. Liability insurance policies are often issued "to protect the producer or manufacturer of goods against loss or injury to the person or property of others caused by the use of his products." 11 *Couch on Insurance, 2d* § 44:387 (2d ed. 1982). The "product hazard" language reflects an attempt to describe that protection. *See CPS Chem. Co. v. Continental Ins. Co.*, 489 A.2d 1265, 1270 (N.J. Super. Ct. Law Div. 1984), *rev'd on other grounds*, 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985). Likewise, the term "completed operations hazard" refers to an analogous form of protection offered for the benefit of those policyholders who provide a service in addition to or instead of a particular product. *See id.* ("Commentators are in complete agreement that this exclusion refers to accidents caused by defective workmanship which arise after completion of work by the insured on construction or service contracts.") (citing 58 A.L.R.3d § 2(a)).

The district court had little trouble concluding that the property damage in this case, which allegedly resulted from the disposal of a manufacturing *waste*

product, involved neither a service operation nor a product of Triangle. We agree. The court noted in *CPS Chem. Co.* that "[the disposal of manufacturing wastes] does not involve construction or service operations" and "[i]ndustrial wastes not intended for consumption, sale, or use by others are not 'products.' " 489 A.2d at 1270. We find this reasoning to be sound and so conclude that the pollution damages which arose in this case also are not covered by the language of these policies containing the modified pollution exclusion.

V

Zurich also issued to Triangle, in May 1984, a third type of insurance policy, a "claims-made" pollution liability insurance policy which contained a clause excluding the pollution arising from certain physical sites. These policies obligate Zurich to indemnify Triangle for property damage claims made during the policy period which result from the

> emision, discharge, release, or escape of any solid, liquid, gaseous, or thermal contaminants, irritants, or pollutants directly from *the insured site* into or upon the land.

The policy goes further to define the term "insured site" as

> 1) the specific location or part thereof specified as such in the declarations of this policy, or 2) any site to which waste materials were legally consigned or delivered by a named insured for storage, disposal, processing, or treatment, provided that the site . . . was *duly authorized* for such storage, disposal, processing, or treatment *under a permit issued by sate or federal authority* and in force at the time of all such consignment or delivery.

(Emphasis changed.) No contention is made in this case that the ~~Ohio~~ landfill was specifically identified as an insured site in the Zurich policies. Thus, the alleged damages resulting from the release of pollutants from

the landfill can only be covered by the policy if "the site . . . was duly authorized for such storage, disposal, processing, or treatment under a permit issued by state or federal authority."

Triangle does not seriously argue that is presented to the district court any evidence upon which a reasonable fact finder could conclude that the Ohio landfill was authorized to store its sludge by the state of Ohio or the federal government. Indeed the record reflects that in 1979 the Ohio Environmental Protection Agency expressly denied requests to allow the dumping of any sludge at the landfill, such requests having been made by the county in which the landfill was located. The state agency concluded:

> No liquids, semi-solids (sludges) or hazardous waste can be approved for landfilling or disposal . . . . The site is considered very permeable and would not secure fluids contained in the waste.

In an effort to avoid the inevitable conclusion that the state of Ohio did not approve the landfill for storage of Triangle's sludge, Triangle now argues that the state was preempted by federal environmental regulations from regulating the disposal of nontoxic wastes at the state's landfills. That the Supreme Court has declared that a state "has every right to [protect its residents' pocketbooks as well as their environment] by slowing the flow of *all* waste into the State's remaining landfills" so long as it does not specifically discriminate against articles of commerce from outside the state, readily disposes of this argument as well. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978). Because the landfill was not approved for storage or disposal of Triangle's waste, we conclude that the district court was also correct in denying coverage under the Zurich claims-made policy.

VI

Finally, we address the argument by Triangle that Liberty Mutual and Zurich should be estopped from denying their duty to defend Triangle in this toxic waste litigation. Triangle relies primarily upon the holdings of *Battista v. Western World Ins. Co., Ins.*, 545 A.2d 841 (N.J. Super. Law Div. 1988), *aff'd in part and rev'd in part on other grounds sub. nom., Battista v. Olson*, 594 A.2d 260 (N.J. Super. Ct. App. Div. 1991), and *Merchants Indem. Corp. v. Eggleston*, 179 A.2d 505 (N.J. 1962). However, neither of these cases substantially supports Triangle's contention.

In *Battista* the court concluded that a defense by an insurance company with a reservation of right to disclaim coverage for *general* damages precluded the insurance company from disclaiming coverage for *punitive* damages *after a loss at trial. Battista,* 545 A.2d at 845-46. Likewise, in *Eggleston*, the New Jersey Supreme Court stated that an insurer can be estopped from raising its defense to indemnification by conducting the insured's legal defense. *Eggleston,* 179 A.2d at 512-13 (dictum).

Unlike the cases upon which Triangle attempts to rely, neither Zurich nor Liberty Mutual defended Triangle until its liability was conclusively established at trial. On the contrary, both insurance companies agreed initially to defend Triangle (with a *complete* reservation or rights under the policies) because the policies, as interpreted by New Jersey law, require them to do so. *See Mt. Hope Inn v. The Travelers Indem. Co.,* 384 A.2d 1159, 1162, 1164 (N.J. Super. Ct. Law Div. 1978). After further review of the situation and their policies (and well before any trial on the issue or Triangle's liability) the insurance companies concluded that they had no duty to indemnify Triangle for the damage resulting from the sludge dumped at the Ohio landfill. Because "the duty to defend extends only to claims on which there would be a duty to indemnify in the event of a judgment adverse to the insured," *see Hartford Accident*

& Indem. Co. v. Aetna Life & Casualty Ins. Co., 483 A.2d 402, 405 (N.J. 1984) (per curiam), Zurich and Liberty Mutual withdrew their defense of Triangle. *See also Burd v. Sussex Mutual Ins. Co.*, 267 A.2d 7, 10 (N.J. 1970) (noting that a covenant to defend does not oblige a carrier to "defend claims which would be beyond the covenant to pay if the claimant prevailed").

There may exist a point before the actual rendering of a verdict against the insured at which the New Jersey courts will consider that, despite a prior reservation as to coverage, the withdrawal from the defense of the insured (because of a determination that coverage does not exist or for other reasons) causes such harm to the insured that the insurer will be estopped from doing so. We are not convinced, however, that such a point arises in this case. The district court noted that "there is no evidence that the actions of Liberty or Zurich prejudiced Triangle by leaving it defenseless or seriously hampered its ability to protect itself so as to warrant estoppel." And Triangle admitted as much at oral argument when it conceded that the only prejudice to Triangle resulting from Liberty Mutual and Zurich's withdrawal from its defense was the loss of their assistance in the on-going litigation. That being the case, there are no grounds for estoppel, *see Eggleston,* 179 A.2d at 512 ("undoubtedly prejudice is an essential ingredient") (dictum), and in light of our decision with regard to the coverage of the insurance policies in question, Liberty Mutual and Zurich had every right to withdraw their legal assistance.

VII

In summary, because the discharge of sludge upon the ground at the Ohio landfill was intended as the standard course of Triangle's business and was not "accidental," policies containing the "original" pollution exclusion for "sudden and accidental" releases of pollutants do not provide coverage, even though the damage caused by the discharge was unintended. Also, because

the damage arising from wastes produced in a manufacturing process are included in neither a "product hazard" nor a "completed operations hazard" under New Jersey law, policies containing the "modified" pollution exclusion do not provide coverage. Finally, because Triangle produced no evidence that the landfill in which its sludge was placed was approved for the storage of such sludge by the state of Ohio or the federal government, the "claims made" policy does not provide coverage for damage caused by the sludge. Triangle's alternative argument that there is coverage-by-estoppel is also rejected in the circumstances of this case, and accordingly the decision of the district court is affirmed.

AFFIRMED

UNITED STATES DISTRICT COURT
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NORTHERN DISTRICT OF WEST VIRGINIA

LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiff,

Vs.

TRIANGLE INDUSTRIES, INC. (now Trian Holdings, Inc.) and TRIANGLE PWC, INC.,
Defendants and Third-Party Plaintiffs,

Vs.

WAUSAU INSURANCE COMPANIES and EMPLOYERS INSURANCE OF WAUSAU, NEW JERSEY PROPERTY-LIABILITY GUARANTY ASSOCIATION, on behalf of IDEAL MUTUAL INSURANCE COMPANY, in liquidation, and ZURICH-AMERICAN INSURANCE COMPANY, severally and in the alternative,
Third-Party Defendants.

CIVIL ACTION NO. 88-0041-W(K)

MEMORANDUM OPINION AND ORDER

Currently pending are the parties, cross-motions for summary judgment in this declaratory action, invoking the Court's diversity jurisdiction. Said motions, having been fully briefed, are ripe for disposition.

The defendants, Trian Holdings, Inc. (formerly Triangle Industries, Inc.), and Triangle PWC, Inc. ("Triangle"), seek a declaration that the plaintiff, Liberty Mutual Insurance Company ("Liberty"), and third-party

defendants, Wausau Insurance Companies and Employers Insurance of Wausau ("Wausau")[1], New Jersey Property-Liability Guaranty Association, on behalf of Ideal Mutual Insurance Company, in liquidation ("NJPLIGA"), and Zurich-American Insurance Company ("Zurich"), owe a duty to defend and indemnify Triangle for governmental demands for clean-up of a hazardous waste facility. All of the insurers deny coverage under their respective insurance policies with Triangle.

The facts underlying this action are basically undisputed. Triangle, a New Jersey Corporation, owned and operated a steel "pickling, plant in Glen Dale, West Virginia. Triangle's operations at this plant generated a waste product known as "lime stabilized waste pickle liquor sludge" ("sludge").

Between November 1977 and October 1980, the sludge was shipped for disposal to the Buckeye Reclamation Landfill, located in St. Clairsville, Ohio. Triangle engaged the services of an independent contractor to transport the sludge to the landfill site.

On October 15, 1980, the Ohio EPA conducted sampling of the sludge located at the Buckeye Landfill, and determined that the sludge was "toxic" according to its criteria. In December 1980, the Ohio EPA conducted further sampling of surface water from a stream near the Buckeye Landfill. Analysis of these water samples indicated that contaminated materials were escaping from the landfill.

On September 8, 1983, the Buckeye Landfill was listed on the National Priority's List pursuant to

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1. By letter dated January 28, 1991, counsel for Wausau has informed the Court that it is currently negotiating a settlement with Triangle and requested that the Court defer ruling on Triangle's summary judgment motion as it pertains to Wausau. The Clerk is directed to file said letter. Accordingly, ruling herein is deferred for a period of thirty (30) days from entry of this Opinion, at which time Triangle and Wausau will submit an Order dismissing their claims as settled or Wausau will file its brief in opposition.

§ 105(8)(b) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"). Based upon tests conducted at the site, the Ohio EPA and the United States EPA ("USEPA") concluded that the Buckeye Landfill had been releasing and was continuing to release hazardous substances which posed an imminent and substantial danger to the public health, welfare, and the environment.

On December 7, 1984, Triangle was notified by the USEPA that it was being designated a "potentially responsible party" pursuant to CERCLA, in connection with the environmental contamination at the Buckeye Landfill. On October 3, 1985, Triangle, along with other potentially responsible parties, executed an administrative order, known as a consent decree, as required by Ohio EPA and USEPA, for the cleanup of the Buckeye Landfill.

NJPLIGA issued a one year comprehensive general liability insurance ("CGL") policy to Triangle, effective January 1, 1981 to January 1, 1982. Liberty issued two CGL policies covering the periods January 1, 1982 to January 1, 1983, and January 1, 1983 to January 1, 1984, as well as a "claims-made" policy that covered the period July 1, 1982 to May 15, 1984 .[2] Zurich issued four CGL policies to Triangle, from January 1, 1984 to January 1, 1985, from January 1, 1985 to January 1, 1986, from January 1, 1986 to January 1, 1987, and from January 1, 1987 to April 1, 1987. Zurich also issued two claims-made Pollution Liability Insurance ("PLI") policies to Triangle which were in effect from May 15, 1984 to November 8, 1985.

By letter dated March 7, 1985, Triangle's counsel notified all of its insurance carriers of the claims asserted by the USEPA rising out of the enforcement actions at

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2. Because Triangle's claims were not made within the applicable dates on Liberty's "claims-made" policy, there are no bona fide disputes concerning coverage under this policy.

the Buckeye Landfill, requested that the carriers provide a defense, and agreed that any defense would be under a reservation of rights by the carriers. By letter (lated November 19, 1986, NJPLIGA denied coverage. By letters dated October 30, 1985, January 23, 1986, February 27, 1986, May 21, 1986, July 8, 1986, August 19, 1986, August 27, 1986, and December 9, 1986, Liberty initially agreed to participate in the defense of Triangle by paying a portion of the fees of Triangle's retained counsel, believing it, as well as the other carriers, had a duty to defend Triangle pending further investigation. However, by letters dated June 1, 1987 and February 1, 1988, Liberty determined that the policies provided no coverage and, therefore, ceased its defense of Triangle. By letter dated April 1, 1985, Zurich also initially agreed to participate in the defense of Triangle under a reservation of rights. By letter dated August 28, 1985, Zurich informed Triangle that it denied coverage and would no longer participate in the defense of Triangle.

All of the insurance policies involved in this action were entered into by the parties in New Jersey. In answering a certified question by the Court, the West Virginia Supreme Court of Appeals held that New Jersey law controls the interpretation of the insurance policies in questions. *Liberty Mut. Ins. Co. v Triangle Industries, Inc.,* 390 S.E.2d 562 (W.Va. 1990). The Court will now proceed to rule on the questions of law involved herein.

Since the CGL policies contain identical language, the Court will proceed with questions of law common to all insurers. The first question is whether an "occurrence" has transpired which would precipitate coverage under the general conditions of the policies. An occurrence, is defined as:

> an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

"Property damage" is defined as:

> (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
>
> (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

The first issue to determine, therefore, is whether "property damage" occurred during the policy period. New Jersey has adopted the "continuous trigger" theory which "holds that where an injury process is not a definite, discrete event, the date of the occurrence should be the continuous period from exposure to the manifestation of damages." *Gottlieb v. Newark Ins. Co.*, 238 N.J. Super 531, 535, 570 A.2d 443 (App.Div. 1990); *Lac D'Amiante du Ouebec Ltee. v. American Home Assur. Co.*, 613 F.Supp. 1549 (D.N.J. 1985). The insurers argue that the manifestation of harm occurred when Ohio EPA detected the contamination at the Buckeye Landfill before January 1, 1981. On the other hand, Triangle argues that since the site has not yet been cleaned up, property damage is still occurring.

The Court believes that under New Jersey law the manifestation of harm occurs when the insured is damaged. *Hartford Acci. & Indem. Co. v. Aetna Life & Cas. Ins. Co.*, 98 N.J. 18, 27, 483 A.2d 402 (1984). As such, the Court finds that the manifestation of harm occurred on December 7, 1984, when Triangle was notified by the USEPA that it was being designated a "potentially responsible party" pursuant to CERCLA. Accordingly, the Court holds that the property damage at the Buckeye Landfill occurred from 1978 until December 7, 1984. Therefore, property damage occurred during all of the CGL policies, periods.

Since property damage occurred during the respective policy periods, the Court now must determine whether the property damage resulted from an accident which was "neither expected nor intended from the standpoint of the insured." In regard to the definition of "occurrence," the focus is on whether the *property damage* was unexpected and unintended by Triangle. The Court has no doubt that Triangle neither expected nor intended that the sludge deposited at the Buckeye Landfill would give rise to a claim by Ohio EPA and USEPA that Triangle would be responsible for clean-up costs at the Buckeye Landfill. Therefore, the Court finds that an "occurrence" has transpired giving rise to coverage under the CGL policies.

The next question of law, is whether the pollution exclusion clause found in the CGL policies of Liberty and NJPLIGA exclude coverage herein. The pollution exclusion clause provided that the policies do not apply:

> To bodily injury property damage arising out of pollution or contamination due to the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Triangle argues that the pollution exclusion clause does not apply so long as the "discharge, dispersal, release or escape" was unexpected and unintended. Lower court decisions in New Jersey do support Triangle's argument that "sudden and accidental" means "unexpected and unintended." *Lansco, Inc. v. Department of Environmental Protection,* 138 N.J.Super. 275, 350 A.2d 520 (Ch.Div. 1975), *aff'd,* 145 N.J.Super. 433, 368 A.2d 363 (App.Div. 1976), *certif. den.,* 73 N.J. 57, 372 A.2d 322(1977). However, the New Jersey Supreme Court has never addressed this issue. The Court need not

decide this issue because the Court finds that Triangle expected and intended that the sludge be deposited at the Buckeye Landfill.

Triangle's argument that it did not expect nor intend the property damage at the Buckeye Landfill does not relieve it from the pollution exclusion clause of the CGL policies. Unlike the definition of "occurrence," which focuses on the property damage, the pollution exclusion clause language focuses on the discharge, dispersal, release or escape of the pollutants. *See Claussen v. Aetna Cas. & Sur. Co.,* 259 Ga. 333, 380 S.E.2d 686 (1989)("The pollution exclusion clause focuses on whether the *'discharge, dispersal or release'* of the pollutants is unexpected and unintended; the definition of occurrence focuses on whether the *property damage* is unexpected and unintended. The pollution exclusion clause therefore has the effect of eliminating coverage for damage resulting from the intentional discharge of pollutants."). To hold otherwise would eviscerate the pollution exclusion clause.

Therefore, since Triangle intentionally had the sludge disposed of at the Buckeye Landfill, the pollution exclusion clause excluded coverage under the CGL policy. There is no coverage under the CGL policies issued by Liberty and NJPLIGA.

Another pollution exclusion clause found in the CGL policies issued by Zurich and in Endorsement 10 of the Liberty policy provides that no coverage exists for pollution damage unless the pollution damage arises out of "products hazard" or the "completed operations hazard." Triangle's claim does not arise out of the "products hazard," since the sludge was clearly a waste product, nor out of the "completed operations hazard" since the sludge was hauled away and dumped off the premises of Triangle by an independent contractor. Therefore, there is no coverage of Triangle under the CGL issued by Zurich nor under Endorsement 10 of the CGL issued by Liberty.

The remaining insurance policy upon which Triangle seeks coverage is Zurich's PLI policy. Zurich argues that there is no coverage because the Buckeye Landfill was not an insured site. "Insured site" is defined as:

> any site to which waste materials were legally consigned or delivered by a ***named insured*** for storage, disposal, processing, or treatment, provided that the site
>
> > (a) is not and was never owned by, operated by, rented or loaned to a ***named insured;*** and
> >
> > (b) was duly authorized for such storage, disposal, processing, or treatment under a permit issued by state or federal authority and in force at the time of all such consignment or deliver.

Zurich asserts that the Buckeye Landfill was not an insured site because it was not licensed to accept the sludge from Triangle. The facts clearly show that the Buckeye Landfill was not licensed by Ohio EPA to receive the sludge from Triangle. Triangle, however, argues that any Ohio regulation prohibiting the disposal of the sludge is preempted by federal law. Triangle's argument is without merit. There is no preemption of Ohio's right to regulate its landfills. Therefore, since the Buckeye Landfill was not authorized to accept the disposal of the sludge from Triangle, the Buckeye Landfill was not an insured site. Accordingly, there exists no coverage under the PLI issued by Zurich.

The final issue to determine is whether Liberty and Zurich are estopped from denying coverage due to the actions they took after being notified by Triangle of the claim made by USEPA. In its notice of claim, Triangle specifically informed the insurers that it would honor a reservation of rights by the carriers. Both Liberty and Zurich agreed to partially reimburse Triangle's retained counsel until a determination of coverage was made. Subsequently, both carriers determined that no coverage existed and, therefore, there was no duty to defend.

Furthermore, there is no evidence that the actions of Liberty or Zurich prejudiced Triangle by leaving it defenseless or seriously hampered in its ability to protect itself so as to warrant estoppel. As such, neither Liberty nor Zurich are estopped from denying coverage. *Griggs v. Bertram,* 88 N.J. 347, 443 A.2d 163 (1982).

It is therefore ORDERED that the respective motions for summary judgment by Liberty, NJPLIGA, and Zurich should be, and the same are hereby, GRANTED, and the respective cross-motions for summary judgment by Triangle are DENIED.

The Clerk is directed to transmit certified copies of this Memorandum Opinion and Order to counsel of record herein.

ENTER:

/s/ William M. Kidd
WILLIAM M. KIDD
UNITED STATES DISTRICT JUDGE

I hereby certify that the annexed instrument
is a true and correct copy of the original filed
in my office
ATTEST: Dr. Wally Edgell
Clerk, U.S. District Court
Northern District of West Virginia

By: /s/ Sheree N. Thompson
Deputy Clerk

UNITED STATES DISTRICT COURT
91 JUL-5 AM 9: 19
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

LIBERTY MUTUAL INSURANCE CO.,

Plaintiff/Counterdefendant,

v.

TRIANGLE INDUSTRIES, INC. (now TRIAN HOLDINGS, INC.) and TRIANGLE PWC, INC.,

Defendants/Counterplaintiffs/ Third-Party Plaintiffs,

v.

WAUSAU INSURANCE COMPANIES and EMPLOYERS INSURANCE OF WAUSAU, NEW JERSEY PROPERTY-LIABILITY INSURANCE GUARANTY ASSOCIATION, on behalf of IDEAL MUTUAL INSURANCE COMPANY, in liquidation, ZURICH-AMERICAN INSURANCE COMPANY and ZURICH INSURANCE COMPANY, jointly, severally and in the alternative,

Third-Party Defendants.

On remand from the Supreme Court of Appeals of West Virginia

Civil Action No. 88-0041-W(K)

FINAL ORDER DISMISSING THIRD-PARTY DEFENDANT, EMPLOYERS' INSURANCE OF WAUSAU, AND ENTERING FINAL JUDGMENT IN FAVOR OF PLAINTIFF, LIBERTY MUTUAL INSURANCE COMPANY, AND THIRD-PARTY DEFENDANTS, ZURICH INSURANCE COMPANY AND NEW JERSEY PROPERTY LIABILITY INSURANCE GUARANTY ASSOCIATION ON BEHALF OF IDEAL MUTUAL INSURANCE COMPANY

It being reported to the Court that the Defendants/Third-Party Plaintiffs, Triangle Industries, Inc. and Triangle PWC, Inc. ("Triangle") and Third-Party Defendant, Employers Insurance of Wausau ("Wausau") having reached an amicable resolution to the claims asserted by and against them, it is accordingly

ORDERED that the claims asserted by Triangle against Wausau and the claims asserted by Wausau against Triangle are hereby dismissed pursuant to *Fed. R. Civ. P.* 41 (a)(2) with prejudice and without costs; and

IT IS FURTHER ORDERED that the Court's March 12, 1991 Memorandum and Opinion Order granting summary judgment in favor of Plaintiff, Liberty Mutual Insurance Company, and Third-Party Defendants, Zurich Insurance Company and New Jersey Property Liability Insurance Guaranty Association on behalf of Ideal Mutual Insurance Company, shall and is hereby declared final pursuant to 28 U.S.C. § 1291.

DATED: 7/3/91 (Signed) William M. Kidd

Honorable William M. Kidd
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.
ATTEST: Dr. Wally Edgell
Clerk, U. S. District Court
Northern District of West Virginia
By: /s/ Sheree N. Thompson
Deputy Clerk

FILED
FEB 21 1990

NO. CC999

LIBERTY MUTUAL INSURANCE COMPANY

v.

TRIANGLE INDUSTRIES, INC., AND TRIANGLE PWC, INC.

v.

WAUSAU INSURANCE COMPANIES AND
EMPLOYERS INSURANCE OF WAUSAU; NEW JERSEY
PROPERTY-LIABILITY GUARANTY ASSOCIATION,
ON BEHALF OF IDEAL MUTUAL INSURANCE COMPANY,
IN LIQUIDATION, AND ZURICH-AMERICAN INSURANCE COMPANY,
SEVERALLY AND IN THE ALTERNATIVE

Certified Question — Certified question answered; case remanded.

Brotherton, Justice

Syllabus

In a case involving the interpretation of an insurance policy, made in one state to be performed in another, the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the parties, or the law of the other state is contrary, to the public policy of this state.

Brotherton, Justice:

This case involves two questions certified to this Court from the United States District Court for the Northern District of West Virginia. The district court asks that we answer the following:

1. Does West Virginia's substantive law apply to the interpretation of the insurance policies at issue?
2. If so, do the insurance policies at issue give rise to a duty to defend and indemnify the insured by the respective insurers?

I.

Triangle Industries (alternately known as Trian Holdings, Inc. and Triangle PWC, hereinafter referred to as Triangle) is a company that was headquartered in New Jersey at the time the insurance coverage at issue was sought. Triangle owned and operated a processing plant in Glen Dale, West Virginia. The Glen Dale plant was engaged in the business of steel "pickling" which generated a waste product known as "lime stabilized waste pickle liquor sludge" (sludge).

Between November, 1977, and October, 1980, the sludge was shipped for disposal to the Buckeye Landfill outside St. Clairsville, Ohio. Triangle engaged the services of an independent contractor to transport the sludge to the landfill.

On October 15, 1980, the Ohio EPA conducted sampling of the sludge located at the Buckeye Landfill site and determined that the sludge was "toxic." In December, 1980, the Ohio EPA conducted further samplings of surface water from a stream near the Buckeye Landfill. The water analysis indicated that contaminated materials were escaping from the landfill.

On September 8, 1983, the Buckeye Landfill was listed on the National Priorities List pursuant to § 105(8)(b) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9601 et seq. (West 1983) (CERCLA). Based upon tests conducted at the site, the Ohio EPA and the Federal EPA concluded that the Buckeye Landfill had been releasing and was continuing to release hazardous substances which posed an imminent and substantial danger to the public health, welfare, and the environment.

On December 7, 1984, Triangle was notified by the Federal EPA that it was being designated a "potentially responsible party" pursuant to CERCLA, in connection with the environmental contamination at the landfill.

On March 7, 1985, Triangle's counsel placed all of Trian and PWC's insurance carriers on notice of the claims asserted by the Federal EPA arising out of the enforcement actions at the Buckeye Landfill. In response, the plaintiff, Liberty Mutual, acknowledged its duty to defend Triangle. In a February 27, 1986, letter from James M. Shaw, Examiner, Special Claims Division, Liberty Mutual Insurance Company, Mr. Shaw stated, "We do, however, agree to participate in the defense of Triangle with other insurers that owe a duty to defend."

On October 3, 1985, Triangle, along with other potentially responsible parties, executed an administrative order, known as a consent decree, as required by the Federal and Ohio EPA, for the cleanup of the landfill.[1]

By letter dated February 1, 1988, Donald Nelson, Technical Claims Specialist at Liberty Mutual Insurance Company, denied coverage under each of Liberty Mutual's insurance policies and declared that Liberty Mutual would not provide indemnification for this claim and would not pay for defense costs beyond February 1, 1988.[2]

By letter dated March 25, 1988, defense counsel wrote to Liberty Mutual to clarify Triangle's position regarding the insurance coverage. In this letter, counsel for Triangle stated that coverage should be afforded under the comprehensive general liability policy (CGL)

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1. The Buckeye Landfill, also known as the Belmont County Landfill, is located in Ohio on approximately 50 acres of a 650-acre tract of land owned by the Ohio Resources Corporation. The property is located approximately four miles southeast of St. Clairsville, Ohio. The landfill has been in operation since 1971.

2. In its brief, Liberty Mutual defends its actions in initially defending the claim by pointing out that it had a duty to investigate the claim to determine whether they did owe a duty to defend. Liberty Mutual denied coverage once they determined they no longer had a duty to defend.

because there had been an "occurrence," as defined by the policy, during the policy period.[3]

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3. The CGL policy contained standard policy language, which provided that:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> Coverage A: Bodily injury or
> Coverage B: Property damage,
>
> to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment or judgment or settlement.

The policy also contains a pollution liability exclusion at subsection (f). It provides that this policy does not apply:

> to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acid, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Liberty Mutual supplied Triangle with a pollution liability policy (PLP), with an effective or "retroactive" date of July 1, 1982. The policy was renewed to run for an additional year from July 1, 1983, to July 1, 1984. The policy appears to have been cancelled in May, 1984. The PLP provides that

> The company [Liberty Mutual] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as compensatory damages because of bodily injury or property damage to which this insurance applies, provided that: (1) such bodily injury or property damage is caused by a pollution incident which commences subsequent to the retroactive date shown in the declaration of this policy, and (2) the claim for such damages is first made against the insured during the policy period and reported to the company during the policy period or within fifteen days after its termination.

Finally, Triangle advised Liberty Mutual that if it continued to decline coverage, Triangle would initiate a declaratory judgment action. However, three weeks later, Liberty Mutual filed suit in United States District Court for the Northern District of West Virginia requesting a declaratory judgment, stating that it owed no duty to defend or indemnify Triangle.

On June 20, 1988, the defendants filed a third party complaint against third party defendants, Wausau Insurance Companies, Zurich American Insurance Company, and New Jersey Property Liability Insurance Guarantee Association on behalf of Ideal Mutual Insurance Company, in liquidation (NJPLIGA), who also held CGL and other insurance policies for the defendants.[4]

On January 17, 1989, the plaintiff, Liberty Mutual, filed a motion for summary judgment against the defendants. on March 1, 1989, the defendants filed a cross motion for summary judgment. Similar motions were filed by the other third party defendants. By order dated July 5, 1989, the United States District Court for the Northern District of West Virginia certified the two questions listed above to this Court.

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4. The defendant contends that it is entitled to coverage under eleven separate policies of insurance, running collectively, from January 1, 1977, to April 1, 1987.

1/1/77 – 1/1/81	Wausau Insurance Co.
1/1/81 – 1/1/82	Ideal Mutual (in liquidation NJPLIGA)
1/1/82 – 1/1/84	Liberty Mutual
1/1/84 – 4/1/87	Zurich Insurance Co.

II.

The first certified question asks that we determine whether West Virginia substantive law applies to the interpretation of the insurance policies at issue in this case. We must first identify the type of issue involved in order to determine what conflict of law rule to apply.[5] This Court has held that the interpretation of insurance policy coverage, rather than liability, is treated as a contract question for purposes of conflicts analysis. *Lee v. Saliga*, ___W.Va. ___, 373 S.E.2d 345, 350 (1988). As the issue presented in the case before us involves a question of the interpretation of the terms of an insurance policy, we must therefore focus our analysis on the conflicts of law rule applicable to a contract issue.

West Virginia law has not yet dealt with the precise issue of the applicable choice of law when an insurance policy is executed in one state for coverage in another state, and damage takes place in a third. The general issue of choice of law was examined in *General Electric Co. v. Keyser*, 166 W.Va. 456, 275 S.E.2d 289 (1981), in which this Court invalidated a choice of law provision contained in a contract after examining § 187(2) of the *Restatement (2d) of Conflict of Laws (Restatement)*. At syllabus point 2, the Court concluded that:

> "The law of the state in which a contract is made and to be performed governs the construction of a contract when it is involved in litigation in the courts of this state." Syl. pt. 1 (in part) *Michigan National Bank v. Mattingly*, W.Va., 212 S.E.2d 754 (1975).

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5. In *Paul v. National Life*, ___W.Va. ___, 352 S.E.2d 550 (1986), this Court upheld the *lex loci delicti* theory of conflicts of law when a tort is involved. In *Paul*, the court found that "*[l]ex loci delicti* has long been the cornerstone of our conflict of laws doctrine. The consistency, predictability, and ease of application provided by the traditional doctrine are not to be discarded lightly . . . ." *Id.* at 555.

More recently, in *Lee v. Saliga*, ___W.Va. ___, 373 S.E.2d 345 (1988), this Court examined insurance contracts under a conflicts of law analysis. *Saliga* involved a question of coverage under an uninsured motorist policy issued in Pennsylvania, where the accident in question occurred in West Virginia. Under West Virginia law, a requirement of physical contact is directly incorporated into the uninsured motorist statute. By contrast, Pennsylvania did not require physical contact under its uninsured motorist act, as the physical contact requirement was held void as contrary to public policy.

After reviewing the West Virginia choice of law cases and the *Restatement*, Justice Miller determined that:

> our traditional contract conflict rule gives substantial deference to the state where the contract is made and where it is to be performed, assuming both incidents occur in the same state. This rule is subject to two qualifications: (1) that the parties have not made a choice of applicable law in the contract itself; and (2) the law of the other state does not offend our public policy.

Id. at 351. Applying that rule to the facts in *Saliga*, the Court determined that "[t]he provisions of a motor vehicle liability policy will ordinarily be construed according to the laws of the state where the policy was issued and the risk insured was principally located, unless another state has a more significant relationship to the transaction and the parties." *Id.* at 353.

Both cases, however, fail to contemplate a situation in which the contract is made in one state to be performed in another state.[6] In the case now before us,

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6. This Court addressed a similar situation in *New v. Tac & C Energy, Inc.*, ___W.Va. ___, 355 S.E.2d 629 (1987), which involved an employment contract for a company based in West Virginia concerning its mine site in Kentucky. A review of § 196 of the *Restatement* revealed that when a contract to render services was involved, the *Restatement* gives preference to the law of the

we find that the policy was issued in New Jersey, while the insured risk was located in West Virginia and the damage occurred in Ohio. Further, as Triangle points out, the insurance policies insured risks in numerous other locations besides the Glen Dale, West Virginia, site. Obviously, these facts differ sufficiently from previous case law so as to require an independent analysis under the *Restatement*.

Section 193 of the *Restatement* concerns what law to apply when the "validity of a contract of fire, surety or casualty insurance and the rights created thereby" are questioned. Specifically, Section 193 provides that the validity of such a contract is determined:

> by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

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state where the services are to be performed, subject to the contracting parties' choice of law and the theory that the preference for the law of the place of rendition of the services can be altered to a state that has a more significant relationship to the parties and the transaction. *Id.* at 631. The Court found that since West Virginia had more substantial contact with the transaction, its law should apply. *Id.*

We believe the reasoning in *Tac & C Energy* is unique to that particular situation. The *Restatement's* preference for the place of rendition of the services can be distinguished from the instant case by the nature of the contract in question. An employment contract centers around the specific services which are to be performed at a place of business. Absent a state with a more significant connection, the state where the services are to be performed is the most likely candidate to govern that contract. That reasoning does not exist in the present situation involving insurance policy interpretation, and thus, does not govern our choice of law analysis.

Commentary B to the *Restatement* explains the language of § 193, noting that normally, the policy will be solicited, delivered, and executed in the same state where the insured is domiciled and the insured risk located. In the present case, however, not only are there multiple states identified where the risks insured under the policy are located, but the place of contract and the place of the insured risk are different. Thus, we turn to § 6 of the Restatement for guidance.

Section 6 of the *Restatement* sets forth the following factors to consider, specifically providing that:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

After reviewing the factors found in § 6 of the *Restatement*, we are of the opinion that the law of the state of the contract should apply. We believe that "certainty, predictability and uniformity of result," as

well as "ease in the determination and application of the law to be applied" is essential to the interpretation of an insurance policy when the law is not otherwise chosen by the parties. Given the increasingly complex nature of the insurance industry, we believe that the needs of the "interstate" system of insurance require that law be applied in the most uniform and predictable manner possible.[7] Although we recognize that, in this case, both West Virginia and Ohio have significant relationships to the transaction, the policy was bargained for, created, and agreed to in New Jersey by both parties. We do not believe the insurance company demonstrated any reasonable expectation at the time the contracts were entered into that any litigation over the policy would be based upon West Virginia law.

Quite simply, we believe that, absent specific provisions to the contrary, it is infinitely more practicable to permit one policy to cover the numerous contracts rather than to require both Triangle and the insurance companies to negotiate individual policies based upon each state where an insured risk is located.[8] When carefully weighed, we conclude that the factors tilt in favor of the law of the place of contract.

Consequently, in a case involving the interpretation of an insurance policy, made in one state to be performed in another, the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the

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7. *See generally,* Note, *The Applicability of General Liability Insurance to Hazardous Waste Disposal,* 57 S.Cal.L.Rev. 745 (1984); Tyler & Wilcox, *Pollution Exclusion Clauses: Problems in Interpretation and Application Under the Comprehensive General Liability Policy,* 17 Idaho L. Rev. 497 (1981).

8. *See Independent PetroChemical Corp. v. Aetna Casualty & Surety Co.,* 674 F.Supp. 354, 356-57 (D.D.C. 1987), in which the district court held that the state in which negotiation and formation occurred has the most substantial interest in seeing its laws applied to the conduct of the parties negotiating for insurance in its jurisdiction.

parties, or the law of the other state is contrary to the public policy of this state.[9]

Because the first certified question has been answered in the negative, the second certified question shall not be addressed. The case is remanded to the Federal District Court for the Northern District of West Virginia.

Certified question answered;
case remanded.

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9. *See Paul v. National Life Insurance Co.*, ___W.Va. ___, 352 S.E.2d 550, 556 (1986).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 23, 1992

No. 91-1685
CA-88-41-W-K

Liberty Mutual Ins v. Triangle Industries

MANDATE

The judgment of this Court dated 3/2/92 takes effect today.

JOHN M. GREACEN
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
April 24, 1992

CA-88-W-K

LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiff-Appellee

v.

TRIANGLE INDUSTRIES, INCORPORATED, a/k/a ANC Holdings, Incorporated; TRIANGLE PWC, INCORPORATED
Defendent & Third Party Plaintiffs-Appellants

v.

NEW JERSEY PROPERTY-LIABILITY GUARANTY ASSOCIATION, on behalf of Ideal Mutual Insurance Company, in liquidation; ZURICH-AMERICAN INSURANCE COMPANIES; ZURICH INSURANCE COMPANY
Third Party Defendants-Appellees

and

WAUSAU INSURANCE COMPANIES; EMPLOYERS INSURANCE OF WAUSAU
Third Party Defendants

WESTINGHOUSE ELECTRIC CORPORATION; INTERNATIONAL BUSINESS MACHINES CORPORATION; OLIN CORPORATION; AMERICAN FIBER MANUFACTURERS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; CHEMICAL MANUFACTURERS ASSOCIATION; INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION
Amici Curiae

No. 91-1685

ORDER

Appellants have filed a motion to recall and stay the mandate, appellees filed responses in opposition to the motion and appellants filed a reply in support of the motion.

The Court denies the motion.

Entered at the direction of Judge Niemeyer, with the concurrence of Chief Judge Ervin and Judge Shedd, United States District Judge, sitting by designation.

For the Court,

/s/ Bert M. Montague
ACTING CLERK

[Triangle PWC, Inc.]
New Brunswick, New Jersey 08903

May 14, 1979

Reply To:
1701 Wheeling Avenue
Glen Dale, West Virginia

Jim Carnes
Cravat Coal Company, Inc,
Box 157
Holloway, Ohio 43985

Subject: Buckeye Reclamation Company
Sludge Disposal

Jim,

The following is a typical analysis presented to us by Lancy – ERC Labs Inc., on our neutralized sludge, which is considered, non-toxic, inert metallic oxides and hydroxides and essentially similar to earth in composition.

	Total
Chromium Cr	0.01 %
Zinc Zn	1.26 %
Iron Fe	3.80 %
Cadmium Cd	0.001%
Copper Cu	0.001%
Calcium Ca	4.05 %
Cyanide Cn	0.001%
Lead Pb	0.004%

Based on the above analysis this material may be classilied, as non toxic, non hazardous, non liquid which could be classified as a solid, suitable for disposal in your landfill operation.

Sincerely,

/s/ Kenneth E. Pickett

Kenneth E. Pickett
Envr. Control Manager

cc: P. Sidhu
R. Nelson
D. Springfield

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC., successor to Morton Thiokol Inc., now named Thiokol Corporation, *Plaintiff-Petitioner,*	:	CIVIL ACTION
v.	:	ON PETITION FOR CERTIFICATION
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *Defendant-Respondent* and LIBERTY MUTUAL INSURANCE COMPANY, AFFILIATED FM INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, FIRST STATE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, UNDERWRITERS AT LLOYDS, LONDON, *Defendants-Respondents,* and AETNA CASUALTY & SURETY COMPANY, ET. AL, *Defendants.*	:	FROM THE FINAL JUDGEMENT OF NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION Sat. Below: Superior Court, Appellate Division Judges King, Cohen and Stern, J.A.D.

PETITION FOR CERTIFICATION AND APPENDIX OF MORTON INTERNATIONAL, INC.

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Attorneys for Petitioner Morton International, Inc.

By: George F. Kugler, Jr.
Edward C. Laird

I. STATEMENT OF THE MATTER INVOLVED

Eight years ago, this Court provided New Jersey's seminal guidance on environmental law in its decision in *DEP v. Ventron Corp.*, 94 N.J. 473 (1983). This is the insurance case arising out of *Ventron* and presents the Court with a similar opportunity to issue critical guidance in the field of environmental insurance law.[1]

Twelve years ago, Judge Lester, after fifty-five (55) trial days over a seven (7) month period, held in the underlying *Ventron* case that "the court cannot find that the acts were done with the intent to pollute the waters of the State or with the knowledge that such an invasion was substantially certain to occur." (Pa 0465).[2]

Four years ago, in 1987, Judge Huot, on the same record, held on *summary judgment* in this insurance coverage action, that "[t]his Court disagrees with Judge Lester's findings in the above quoted passage with respect to intent. . . . The damage was expected and intended. . . ." (Pa 0041-0042). The Appellate Division affirmed Judge Huot by erroneously evaluating the insured's waste disposal practices against a standard used for determining intent in child molestation cases. Thus, the insured was summarily dismissed on the issue of intent by the Courts of this State without *one day* of trial even though it has succeeded in the underlying action on the same issue after *55 days* of trial. The Appellate Division's decision revolutionizes the determination of coverage disputes in New Jersey and threatens to emasculate comprehensive general liability coverage for insureds throughout the State.

Petitioner, Morton, Ventron's successor in interest, brought this suit in 1985 against the insurers that covered Ventron from 1960 to 1976, seeking indemnity and defense costs. The defendant insurers then moved

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1. Estimated final costs for the Berry's Creek clean-up are projected to be in the millions of dollars.

2. The record references are to plaintiff's appendix submitted to the Appellate Division on the appeal below.

for summary judgment against Morton on the issues of both indemnity and duty to defend[3]. Judge Huot heard that motion, and despite his reliance on the record of the underlying trial, rejected Judge Lester's findings and concluded as a matter of law that Ventron and its predecessors were substantially certain that their mercury processing operations would cause harmful mercury pollution of Berry's Creek and the surrounding area.[4] He thereby foreclosed Morton from obtaining the benefits of insurance coverage for which Ventron and its predecessors had paid substantial premiums for many years.

Morton also sought summary judgment on defense costs on the ground that the DEP's complaint clearly included on its face claims that fell within the four corners of the applicable insurance policies. Judge Huot, recognizing that at least a part of the complaint fell within the applicable General Accident policies, partially granted Morton's summary judgment motion and ruled that General Accident had a duty to defend the DEP's claims in the underlying suit. As a result of this ruling, a damage trial was held to quantify General Accident's liability. This trial resulted in a judgment on behalf of Morton and against General Accident for $100,429.07

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3. The motion for summary judgment made by the carriers required the trial court to construe, among other things, policy language which, depending on the policy period in question, expressed coverage as a function of "accident" or in the terms of an "occurrence" (*i.e.*, whether injury was expected or intended from the insured's standpoint). The Appellate Division construed the term "accident" in accordance with its decision in *Broadwell Realty Servs. Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super 516 (App. Div. 1987).

4. In its own cross-motion for summary judgment seeking indemnity Morton asserted that Judge Lester's findings in the underlying action eliminated any genuine issue of fact and compelled judgment in plaintiff's favor. The Appellate Division, contrary to Morton's intention and existing precedent, took Morton's cross-motion as an indication that the parties had stipulated all the material facts of this dispute.

(for early defense of the DEP claim) and $40,000 in attorneys' fees incurred in prosecuting the present action.

In affirming Judge Huot's ruling on indemnity, the Appellate Division stated that the precise controlling theory for ascertaining intent was "obscure, if not uncertain," but nonetheless applied on objective standard. It then concluded that the insured intended the consequences of its disposal activities because it "must have been substantially certain" that its disposal activities would cause the consequences that followed. (Slip. Op. at 46). In reaching that conclusion, the Appellate Division inferred intentional consequences from the intentional character of the acts of disposal. This panel thus placed itself in direct conflict with other Appellate Division precedent,[5] as well as the views of at least two Justices of the New Jersey Superme Court and the weight of authority throughout the country.[6] This analysis took the Appellate Division so far that it equated the non-assaultive business behavior of Ventron and its predecessors with the intentional sexual molestation of children.

The Appellate Division also found that, despite the unquestioned existence of claims that fell within the four corners of the insurance policies, no carrier was obligated to defend any of the claims brought in the underlying action or reimburse Morton for the costs incurred. Although recognizing the oft-repeated New

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5. *See SL Indus. v. American Motorists Ins. Co.*, 248 N.J. Super. 458 (App. Div. 1991), *certif. granted*, ____ N.J. ____ (Sept. 16, 1991) (No. 33,848) and *Allstate Ins. Co. v. Schmitt*, 238 N.J. Super. 619 (App. Div.), *certif. denied*, 122 N.J. 395 (1990).

6. *See Ambassador Ins. Co. v. Montes*, 76 N.J. 477, 486-492 (1978) (Pashman, J. and Handler, J., concurring). *See also id.* at 494 (Clifford, J., dissenting). The concurring opinion expressed the appropriate standard as follows: "[An insured] should be charged with intent to injure . . . only if that was his subjective desire." 76 N.J., at 489.

Jersey law that the duty to defend is broader than the duty to pay, the Appellate Division concluded that whenever the carrier disputes the existence of an occurrence, it is entitled to sit on the sidelines, force the insured to incur the huge financial burden of defending the underlying litigation, compel the insured to spend more money to try to establish coverage, and reimburse the insured, if at all, only if the coverage action is resolved favorably to the insured. This, for all intents and purposes, deprives the insured of a defense under its policy and clearly is contrary to its reasonable expectations.

This decision thus strikes at the very heart of two of the most critical issues in environmental insurance law; namely, the issue of intent and the duty to defend. Left standing, this decision portends ominous consequences for insureds throughout the State of New Jersey whether they be business entities, private individuals, or governmental bodies. Therefore, on October 22, 1991, Morton filed its Notice of Petition for Certification from the Appellate Division's judgment.

II. QUESTIONS PRESENTED

1. In an insurance coverage action where intention of the insured is a critical issue to be decided, did the trial court and the Appellate Division erroneously engage in fact-finding on a summary judgment motion?

2. Was it proper for the Appellate Division to equate the standard for determining intent in an environmental insurance case involving non-assaultive business behavior (waste disposal) with the standard used in child molestation cases?

3. Is the insured's duty to defend an environmental claim under a comprehensive general liability policy only triggered at the time a duty to indemnify is established in a subsequent coverage action?

4. In insurance coverage litigation, is the carrier estopped from challenging the results of the underlying case where: first, it had notice of the matter; second, it

had opportunity to defend; and third, the underlying case decided the same factual issue (intent) that is central to the insurance coverage action?

Depending upon how the Court answers the foregoing questions, the following additional issues may need to be addressed:

5. When does a liability carrier's duty to defend terminate?

6. Is the insured entitled to recover its full counsel fees expended in the action establishing the duty to defend?

7. In the event a liability carrier is obligated to defend only a portion of a complaint, does the burden of allocation of defense costs rest on the carrier?

8. Did Judge Huot and the Appellate Division err in preventing Morton from pursuing discovery of policy drafting history?

SUPREME COURT OF NEW JERSEY
C-629 September Term 1991
34,341

MORTON INTERNATIONAL, INC., etc.,
Plaintiff-Petitioner,
v.
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA,
Defendant-Respondent
and
LIBERTY MUTUAL INSURANCE COMPANY et al.,
Defendants-Respondents,
and
AETNA CASUALTY & SURETY COMPANY et al.,
Defendants.

ON PETITION FOR CERTIFICATION

Filed March 8, 1992

CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-895-89T3 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 2nd day of March, 1992.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/
CLERK OF THE SUPREME COURT
OF NEW JERSEY

/s/
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
Docket No. 34,341

	:	*Civil Action*
	:	
MORTON INTERNATIONAL, INC., successor to Morton-Thiokol, Inc., now named Thiokol Corporation, *Plaintiff-Appellant,*	:	CROSS PETITION FOR CERTIFICATION FROM JUDGMENT OF APPELLATE DIVISION
	:	
	:	App. Div. Docket No.
vs.	:	A-895-89T3
	:	
	:	SAT BELOW:
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.,* *Defendants-Respondents*	:	Honorable Michael P. King
	:	Honorable Richard S. Cohen
	:	Honorable Edwin H. Stern

CROSS PETITION FOR CERTIFICATION OF DEFENDANTS-RESPONDENTS INSURANCE COMPANY OF NORTH AMERICA, AMERICAN HOME ASSURANCE CO., LIBERTY MUTUAL INSURANCE COMPANY, UNDERWRITERS AT LLOYD'S LONDON, AND LONDON MARKETS INSURANCE COMPANIES

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November 11, 1991

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[Listing of Counsel Continued on Back of Cover]

PRELIMINARY STATEMENT

In the event that this Court denies petitioner's request for certification, this cross petition will be moot. However, if this Court grants certification, the respondents respectfully urge the Court to address the following issues of importance to both insurers and insureds in this State: (1) the "pollution exclusion"; (2) "late notice"; (3) "pre-existing loss"; and (4) "as damages".[1]

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1. Respondent American Home Assurance Company joins in this cross petition only as to the pollution exclusion. Respondents Liberty Mutual Insurance Company, Underwriters at Lloyd's London and the London Markets Insurance Companies do not join in the cross petition as to late notice.

Across the country, Supreme Courts of other states have addressed and are addressing the issues presented in this appeal. These decisions, however, have applied the law of their particular jurisdiction. Respondents respectfully submit that it is important for the New Jersey Supreme Court to address these same issues, since this Court has yet to do so.

At the outset, respondents emphasize that the Appellate Division correctly decided that there was no coverage for the underlying claims because there was no accident or occurrence. However, in doing so, the Appellate Division declined to correct its prior erroneous decisions with respect to the pollution exclusion, and indeed, the Appellate Division reaffirmed its prior rulings on this exclusion. These prior erroneous decisions need to be corrected by this Court.

Respondents ask this Court to address the "pollution exclusion," and in particular, to rule that the pollution exclusion applies to the *discharge* of pollutants and not to the *damage* that results from a discharge. Another important issue is whether the term "sudden," which is contained in the pollution exclusion has a temporal meaning. To date, the vast majority of courts from other jurisdictions and the clear trend of decisions across the country apply the pollution exclusion to the discharge and construe the word "sudden" as having a temporal element that precludes coverage for discharges of pollutants that take place over a gradual period of time.

Notwithstanding, lower courts of this state have continued to follow the outmoded precedent of the Appellate Division with respect to the pollution exclusion, which precedent is contrary to the view of the substantial majority of jurisdictions that have addressed the issue. In fact, the respondents in this appeal asked the Appellate Division to correct these prior rulings; the Appellate Division declined to do so, but expressly left it for this Court to clarify the law. (Opinion at 49, fn1)

Apart from the foregoing, certain petitioners also respectfully request, should this Court take this appeal,

that the Court address the issues of "late notice", "pre-existing loss" and "as damages".

Respondents note that the case at bar is but one of a large number of environmental coverage actions pending in the courts of this State. The decision of this Court on the foregoing issues will settle the law in New Jersey as to these crucial legal questions and will undoubtly assist both the courts below and the litigants in clearing many pending matters from the dockets.

SUPREME COURT OF NEW JERSEY
C-630 September Term 1991
34,341

MORTON INTERNATIONAL, INC., etc.,
Plaintiff-Cross-Respondent,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,
Defendants-Respondents.

and

LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Defendants-Cross-Petitioners,

and

AETNA CASUALTY & SURETY COMPANY, et al.,
Defendants.

ON CROSS-PETITION FOR CERTIFICATION

FILED
MAR 3 1992

CLERK

To the Appellate Division, Superior Court:

A cross-petition for certification of the judgment in A-895-89T3 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the cross-petition for certification is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 2nd day of March, 1992.

/s/
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/

CLERK OF THE SUPREME COURT
OF NEW JERSEY

No. 91-1685
IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LIBERTY MUTUAL INSURANCE COMPANY,	:	
Plaintiff/Appellee,	:	On Appeal from the
	:	Final Judgment of
vs.	:	the United States
	:	District Court for
TRIANGLE INDUSTRIES, INC. AND TRIANGLE PWC, INC.,	:	the Northern
	:	District of West
Defendants/Appellants,	:	Virginia in Civil
	:	Action No.
vs.	:	88-41-W-K
	:	
WAUSAU INSURANCE COMPANY, et al,	:	
Third-party Defendants/Appellees	:	

LIBERTY MUTUAL INSURANCE COMPANY'S, OPPOSITION TO THIRD-PARTY PLANTIFFS/ APPELLANTS' MOTION TO RECALL AND STAY THE MANDATE

PRELIMINARY STATEMENT

On March 23, 1992, this Court issued a Mandate effectuating its March 2, 1992 judgment in this matter. In its March 2, 1992 Opinion, this Court affirmed the judgment of the United States District Court for the Northern District of West Virginia, and held that under New Jersey law the "original" pollution exclusion clause in some of the insurance policies issued by Liberty Mutual Insurance Company, Zurich Insurance Company and Ideal Mutual Insurance Company (the "Insurers") to Triangle Industries, Inc. and Triangle PWC, Inc. ("Triangle") barred coverage for environmental damage alleged to arise from regular disposal in a landfill

of the waste products of a standard manufacturing process. *Liberty Mutual Ins. Co. v. Triangle Ind. et al.*, No.

In addition, to the extent that there is any inconsistency between the *CPC International* decision and this Court's March 2, 1992 judgment, it is the role of the U.S. Supreme Court to determine which decision is correct. Pursuant to Supreme Court Rule 13, the period for Triangle to petition for Certiorari has not yet expired. Triangle will thus not suffer injustice if this Court's Mandate remains in place.

CONCLUSION

For the foregoing reasons, Insurers respectfully request that this Court deny Triangle's Motion to Recall and Stay the Mandate in this case.

Respectfully submitted,

/s/ LEE H. GLICKENHAUS

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